SUPREME COURT, U. S.

NOV 26 197

MICHAEL RODAK, JR.,

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ

Petitioners

vs.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION NO. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED MAY 19, 1973
CERTIORARI GRANTED OCTOBER 9, 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ

Petitioners

vs.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION NO. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Respondents

INDEX

	PAGE
Relevant Docket Entries in the United States District Court for the District of New Jersey	1
Relevant Docket Entries in the United States Court of Appeals for the Third Circuit:	
Case No. 71-1773	3
Case No. 71-1774	8
Case No. 71-1775	10
Complaint	12

Motion by Plaintiff for Preliminary Injunction 26

Affidavit of A. Robert Schaevitz 29

District Court Order Fixing June 24, 1971 as Hearing Date on Plaintiff's Motion for Preliminary Injunction 35

Hearing on Motion by Teamsters Local 676 for Leave to Intervene As a Party Defendant; Hearing on Motion by Plaintiff for a Preliminary Injunction; Hearing on Motion by Defendants for Dismissal of Action 36

District Court Order Dismissing Plaintiffs' Motion for Preliminary Injunction and Dismissing Complaint, Without Costs 46

Opinion of the Court of Appeals for the Third Circuit.. 47

Judgment of the Court of Appeals for the Third Circuit . 73

Order of the Court of Appeals Granting Amicus Status to the United States Chamber of Commerce and Directing That the Affidavit of Professor Northrup Will Be Received and Filed with the Record 75

Affidavit of Dr. Herbert R. Northrup 76

Order Denying Petition for Rehearing En Banc of Court's Panel Order of 11/22/72 108

United States Constitution, Article III 109

United States Constitution, Article VI 109

National Labor Relations Act, 29 U. S. C. § 158 et seq... 110

Social Security Act of 1935, As Amended, 42 U. S. C. § 602 et seq. 112

Regulation of the United States Department of Health, Education and Welfare Prior to July 12, 1973, Chapter II, Title 45, C. F. R. 121

Regulation of the United States Department of Health, Education and Welfare, Issued July 12, 1973, Chapter II, Title 45, C. F. R. 123

New Jersey Assistance for Dependent Children Law, NJSA 44:10-1 et seq. 126

New Jersey Public Assistance Law, NJSA 44:8-107 et seq. 127

Regulation of State of New Jersey; Department of Institutions and Agencies; Division of Welfare—Bureau of Assistance 129

New Jersey Assistance to Families of the Working Poor Law, NJSA 44:13 et seq. 132

New Jersey Unemployment Compensation Act, NJSA 43:21-1 et seq. 136

Affidavit of Harold L. Finkle, and Attached Exhibit A, the Current Bargaining Agreement Between Supertire Engineering Company, Supercap Corporation, and Teamsters Local Union No. 676 141

APPENDIX

RELEVANT DOCKET ENTRIES.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 853-71

Date	Filings—Proceedings
6–10–71	Complaint, filed.
6–10–71	Motion by Plaintiff for Preliminary Injunction, filed.
6–14–71	Order fixing June 24, 1971 as hearing date on Plaintiffs' Motion for Preliminary Injunction, filed (Kitchen) Notice mailed.
6–23–71	Motion by Teamsters Local 676, etc. for leave to intervene as a defendant, filed (Memo)
6–24–71	Hearing on Motion by Teamsters Local 676 for leave to intervene as a party defendant; Ordered Motion Granted. Hearing on Motion by Plaintiff for a Preliminary Injunction; Ordered Motion Denied; Hearing on Motion by Defendants for Dismissal of Action; Ordered Motion Granted; Order to be submitted; (Kitchen).
7–13–71	Order dismissing Plaintiffs' Motion for Preliminary Injunction and dismissing complaint, without costs, filed (Kitchen) Notice mailed.
7–16–71	Notice of Appeal, filed 6/15/71 (copies mailed Clerk USCA and All Counsel).

7 27–71 Motion and Notice to take depositions of Herbert R. Northrup, Robert F. Gallagher, Charles D. Johnson and Fred L. Streng, filed.

8–11–71 Notice of Hearing on Motion by Plaintiffs for Leave to take depositions filed.

8–24–71 Hearing on motion by plaintiffs for leave to take depositions—Ordered Motion Denied—Order to be submitted (Kitchen).

9– 3–71 Order denying plaintiffs' motion for depositions pending appeal, filed (Kitchen).
Notice mailed.

UNITED STATES COURT OF APPEALS

For the Third District

Case No. 71-1773

8–24–71	Copy of Notice of Appeal rec'd. July 17, 1971, filed.
10– 2–71	Motion by Chamber of Commerce of the United States of America for leave to intervene, or alternatively, to participate as Amicus Curiae, filed. (20 copies). Certificate of service by mail on October 1, 1971, filed. (Covers 71-1773-5).
10– 8–71	Answer by appellee Teamsters Local Union No. 676, to motion of Chamber of Commerce to intervene, etc., and Motion to strike and delete from record the affidavit of Professor Herbert Northrup appended to Amicus Curriae brief, filed. (4 copies). Certificate of service attached. (Covers 71-1773-5).
10–15–71	Chamber of Commerce's reply to answer by appellee, Teamsters Local Union No. 676, to motion by Chamber of Commerce motion for leave to intervene, etc., received. (4 copies). Certificate of service attached. (Covers 71-1773-5).
10–20–71	Order (Aldisert, Gibbons and Rosenn, Circuit Judges) denying motion by Chamber of Commerce of the United States of America for leave to intervene; granting Chamber of Commerce of the United States leave to file amicus curiae brief; and referring motion by appellee Teamsters Local Union No. 676, to strike and delete from record the affidavit of Professor Herbert Northrup appended to the Chamber of Commerce amicus curiae brief, for

disposition to the panel who will hear the appeal on the merits, filed. (Covers 71-1773-5).

10–20–71 Brief for amicus curiae Chamber of Commerce of the United States of America, Received October 2, 1971, filed. (25 copies). (Covers 71-1773-5).

11– 5–71 Order (Clerk) granting appellants' motion to consolidate appeals for briefing and argument, filed. (Covers 71-1773-5).

11– 3–71 Brief for appellee, received November 4, 1971, filed. (25) copies. Certificate of service by mail on November 3, 1971, filed.

11–10–71 Letter, dated November 9, 1971, from counsel for Juanita E. Dicks, Welfare Director of the Municipal Welfare Department of the City of Camden, stating that they join in adopting the brief filed on behalf of appellees, McCorkle, Engelman and Streng.

11– 4–71 Brief for appellees, McCorkle, Engelman and Streng, received November 8, 1971, filed. (25 copies). (Covers 71-1773-75).

10–29–72 Consent motion International Brotherhood of Teamsters, Chauffers Warehousemen and Helpers of America for leave to file brief amicus curiae and for leave to extend time to file amicus curiae brief to November 18, 1971, filed. (5 copies). Certificate of service attached. (4 consent letters attached. (Covers 71-1773-5).

11–10–71 Motion by Chamber of Commerce of the United States for reconsideration and suggestion for reconsideration en banc of this Court's order dated October 20, 1971 which denied the Chamber's motion to intervene, filed. (11 copies). Certificate of service attached. (Covers 71-1773-5).

11–18–71 Amicus Curiae Brief for International Brotherhood of Teamsters, Chauffers, Wearhousemen and Helpers of America, filed. (25 copies). Certificate of service by mail on November 18, 1971 attached. (Covers 71-1773-5).

11–19–71 Reply Memorandum by appellee to motion for reconsideration and suggestion for reconsideration en banc, received and filed. (9 copies). Certificate of service attached. (Covers 71-1773-5).

11–24–71 Letter, dated November 24, 1971, with enclosures, from John W. Pelino, Esquire, counsel for the Chamber of Commerce of the United States, in regard to the motion by the Chamber of Commerce of the United States for reconsideration and suggestion for reconsideration en banc of this Court's order dated October 20, 1971, filed. (6 copies). (Covers 71-1773-5). Proof of service in letter.

12– 3–71 Reply brief for appellants (and appendix received for the information of the Court) received and filed. (25 copies). (Covers 71-1773-5).

12– 9–71 Order denying petition for rehearing by The Chamber of Commerce of the United States, filed. (Covers 71-1773-5).

12–28–71 Motion by amicus curiae, Chamber of Commerce of the U. S. A., for leave to file amicus reply brief, filed. (Covers 71-1773-5).

12–31–71 Reply of Teamsters Local Union 676 to motion for leave to file amicus reply brief by U. S. Chamber of Commerce, filed. Certificate of Service attached. (Covers 71-1773-5).

1– 7–72 Response to Reply of Teamsters to Motion for leave to file amicus reply brief rec'd from amicus curiae, U. S. Chamber of Commerce, rec'd. (Covers 71-1773-5).

9–14–72 Argued. Coram: McLaughlin, Adams and Gibbons. (Covers 71-1773-71-1775).

9–28–72 Supplemental brief on behalf of Chamber of Commerce of U. S., amicus curiae, filed. (4 copies) (Covers 71-1773-71-1775).

11–22–72 Opinion of the Court (McLaughlin, Adams and Gibbons, Circuit Judges with separate dissenting opinion by Judge Gibbons), filed. (Covers 71-1773/71-1775).

11–22–72 Judgment dismissing the appeals in these cases as moot, and remanding to the District Court with directions to vacate its judgment, filed July 13, 1971, and to dismiss for the same reason, all in accordance with the opinion of this Court. Costs taxed against appellants, filed. (Covers 71-1773/71-1775).

11–22–72 Order (McLaughlin, Adams and Gibbons, Circuit Judges) granting amicus status in this appeal to the United States Chamber of Commerce and directing that the affidavit of Professor Northrup will be received and filed with the record, filed. (Covers 71-1773/71-1775) on the merits.

12– 6–72 Petition for Rehearing, filed. (25 copies) (Covers 71-1773/71-1775).

12– 6–72 Petition for Rehearing of November 22, 1972 panel order by Chamber of Commerce and Suggestion for rehearing in banc, filed. (25 copies). (Covers 71-1773/4/5).

12– 6–72 Motion by Chamber of Commerce for leave to file a supplement to above petition for rehearing of 11/22/72 panel order out of time, filed. (25 copies).

12–20–72 Order (Seitz, McLaughlin, Van Dusen, Aldisert, Adams, Gibbons, Rosenn) denying petition for re-

hearing en banc of this Court's panel order of 11/22/72 filed by Chamber of Commerce of U. S. A., filed. (Covers 71-1773/4/5).

12–20–72 Order (Seitz, McLaughlin, Van Dusen, Aldisert, Adams, Gibbons, Rosenn) denying petition for rehearing of Super Tire Engineering Co. et al., filed. (Covers 71-1773/4/5).

12–29–72 Certified judgment in lieu of formal mandate issued.

12–29–72 Record returned to Clerk of D. C.

1– 3–73 Certified copy of D. C. order dated January 2, 1973 by John J. Kitche, U. S. D. J. dismissing the complaint in this matter as moot, rec'd from Clerk of D. C., filed.

1– 3–73 Receipt for record, filed.

3–14–73 Copy of letter dated March 12, 1973 rec'd from Clerk of Supreme Court extending the time for filing a petition for writ of certiorari to and including May 19, 1973. (Covers 71-1773/5).

5–24–73 Notice of filing (on May 19, 1973) of petition for writ of certiorari rec'd from Clerk of Supreme Court, filed. (S. C. No. 72-1554). (Covers 71-1773/4/5).

UNITED STATES COURT OF APPEALS

For the Third Circuit

Case No. 71-1774

8–24–71	Copy of Notice of Appeal rec'd. July 17, 1971, filed.
10– 2–71	Motion by Chamber of Commerce of the United States of America for leave to intervene, or alternatively, to participate as Amicus Curiae, filed. (20 copies). Certificate of service by mail on October 1, 1971, filed. (Covers 71-1773-5).
10– 8–71	Answer by appellee Teamsters Local Union No. 676, to motion of Chamber of Commerce to intervene, etc., and Motion to strike and delete from record the affidavit of Professor Herbert Northrup appended to Amicus Curiae brief, filed. (4 copies). Certificate of service attached. (Covers 71-1773-5).
10–15–71	Chamber of Commerce's reply to answer by appellee, Teamsters Local Union No. 676, to motion by Chamber of Commerce motion for leave to intervene, etc., received. (4 copies). Certificate of service attached. (Covers 71-1773-5).
10–20–71	Order (Aldisert, Gibbons and Rosenn, Circuit Judges) denying motion by Chamber of Commerce of the United States of America for leave to intervene; granting Chamber of Commerce of the United States leave to file amicus curiae brief; and referring motion by appellee Teamsters Local Union 676, to strike and delete from record the affidavit of Professor Herbert Northrup appended to the Chamber of Commerce amicus curiae brief, for disposition to the panel who will hear the appeal on the merits, filed. (Covers 71-1773-5).

10–20–71	Brief for amicus curiae Chamber of Commerce of the United States of America, received October 2, 1971, filed. (25 copies). (Covers 71-1773-5).
10–23–71	Motion by appellants to consolidate appeals for briefing and argument, filed. (4 copies). Certificate of service attached. (Covers 71-1773-5).
11– 3–71	Submitted on above motion. Clerk.

UNITED STATES COURT OF APPEALS

For the Third Circuit

Case No. 71-1775

8–24–71 Copy of Notice of Appeal rec'd. July 17, 1971, filed.

Record rec'd. August 16, 1971, filed. (Covers 71-1773-71-1775).

Appearance of Herbert G. Keene, Jr., Esquire; Stradley, Ronon, Stevens and Young and A. Fred Ruttenberg, Esquire; Archer, Greiner, Hunter and Read for appellants filed. (Covers 71-1773-71-1775).

10– 2–71 Motion by Chamber of Commerce of the United States of America for leave to intervene, or alternatively, to participate as Amicus Curiae, filed. (20 copies). Certificate or service by mail on October 1, 1971, filed. (Covers 71-1773-5)

10– 8–71 Answer by appellee Teamsters Local Union No. 676, to motion of Chamber of Commerce to intervene, etc., and

Motion to strike and delete from record the affidavit of Professor Herbert Northrup appended to Amicus Curiae brief, filed. (4 copies) Certificate of service attached. (Covers 71-1773-5).

10–15–71 Chamber of Commerce's reply to answer by appellee, Teamsters Local Union No. 676, to motion by Chamber of Commerce motion for leave to intervene, etc., received. (4 copies). Certificate of service attached. (Covers 71-1773-5).

10–20–71 Order (Aldisert, Gibbons and Roseen, Circuit Judges) denying motion by Chamber of Commerce of the United States of America for leave to inter-

vene; granting Chamber of Commerce of the United States leave to file amicus curiae brief; and referring motion by appellee Teamsters Local Union 676, to strike and delete from record the affidavit of Professor Herbert Northrup appended to the Chamber of Commerce amicus curiae brief, for disposition to the panel who will hear the appeal on the merits, filed. (Covers 71-1773-5).

10–20–71 Brief for amicus curiae Chamber of Commerce of the United States of America, received October 2, 1971, filed. (25 copies). (Covers 71-1773-5).

11– 3–71 Submitted on above motion. Clerk.

(See No. 71-1773 for Complete Docket Entries).

IN THE UNITED STATES DISTRICT COURT
For the District of New Jersey

Super Tire Engineering Company; Supercap Corporation; and A. Robert Schaevitz

vs.

Lloyd W. McCorkle, Commissioner of the Department of Institutions and Agencies of the State of New Jersey;

Irving J. Engelman, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey;

Fred L. Streng, Director of the Camden County, New Jersey Welfare Board; and

Juanita E. Dicks, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey.

Civil Action No. 853-71

COMPLAINT.

Count I.

Super Tire Engineering Company and Supercap Corporation

vs.

Lloyd W. McCorkle; Irving J. Engelman; Fred L. Streng; and Juanita A. Dicks

1. Plaintiffs Super Tire Engineering Company and Supercap Corporation are corporations organized and existing under the laws of the State of New Jersey with their principal place

of business located at 7255 Crescent Boulevard, Camden, New Jersey.

2. Plaintiff A. Robert Schaevitz is an individual residing at 300 South Park Drive, Collingswood, Camden County, New Jersey and is a citizen and taxpayer of the United States and of the County of Camden and the State of New Jersey.

3. Defendant Lloyd W. McCorkle is sued herein in his capacity as Commissioner of the Department of Institutions and Agencies of the State of New Jersey; Defendant Irving J. Engelman is sued herein in his capacity as Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; Defendant Fred L. Streng is sued herein in his capacity as Director of the Camden County, New Jersey Welfare Board; and Defendant Juanita E. Dicks is sued herein in her capacity as Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey.

4. This action arises under Article VI, Clause 2 of the Constitution of the United States and the Labor-Management Relations Act of 1947, as amended, 29 U. S. C. § 141 *et seq.*, an act of Congress regulating commerce. This Court has jurisdiction of this action pursuant to 28 U. S. C. §§ 1331, 1337 and 2201; the matter in controversy exceeds the sum of $10,000, exclusive of interest and costs.

5. Plaintiff Super Tire Engineering Company is engaged in the business of truck tire sales and service and the manufacture and sale of industrial polyurethane tires and wheels. Plaintiff Supercap Corporation is engaged in the business of truck tire recapping and repairing. Each of said corporate Plaintiffs is engaged in commerce as defined in Section 2(6) of the Labor-Management Relations Act of 1947, as amended, 29 U. S. C. § 152(6). Teamsters Local Union No. 676, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is certified by the National Labor Relations Board as the exclusive collective bar-

gaining representative for all production and maintenance employees employed by each of said corporate Plaintiffs.

6. At midnight on May 14, 1971, upon the expiration of the collective bargaining agreement, which had been in force since May 15, 1968, between Plaintiffs Super Tire Engineering Company and Supercap Corporation and Teamsters Local Union No. 676, all of said Plaintiffs' production and maintenance employees, represented by Teamsters Local Union No. 676, struck Plaintiffs as a result of the parties' failure to reach a new agreement, and said employees have remained out of work in support of their bargaining demands to date.

7. Plaintiffs are informed, believe and therefore aver that subsequent to May 14, 1971, and continuing to date, many of their employees, who are represented by Teamsters Local Union No. 676, and who are directly engaged in and actively participating in the aforesaid economic strike against Plaintiffs, have applied for and have received and, unless Defendants are restrained and enjoined as prayed herein, will continue to apply for and receive public assistance and public welfare benefits under the General Public Assistance Law, N. J. S. A. 44:8-107 *et seq.*, and Assistance for Dependent Children Law, N. J. S. A. 44:10-1 *et seq.*, of the State of New Jersey.

8. Public assistance is available under the General Public Assistance Law, N. J. S. A. 44:8-107 *et seq.*, to needy persons only "* * * where such persons are willing to work but are unable to secure employment due either to physical disability or inability to find employment * * * ." N. J. S. A. 44:8-108-109.

9. Public assistance is available under the Assistance for Dependent Children Law, N. J. S. A. 44:10-1 *et seq.*, to needy dependent children and the parent(s) or relative(s) with whom they are living in accordance with the requirements and restrictions of Sub-Chapter IV of the federal Social Security Act of 1935, as amended, 42 U. S. C. § 601 *et seq.* 42 U. S. C. §§ 602(a)(C), 606(e)(1), and 607(b)(1)(B) provide in

pertinent part that public assistance shall not be available under an approved State plan (here, N. J. S. A. 44:10-1 *et seq.*) where the individual, parent or relative has without good cause terminated his employment or has without good cause refused to accept a bona fide offer of employment in which he or she is able to engage.

10. Despite the express restrictions contained in the General Public Assistance Law, N. J. S. A. 44:8-107 *et seq.*, and the Assistance for Dependent Children Law, N. J. S. A. 44:10-1 *et seq.*, of the State of New Jersey and the federal Social Security Act of 1935, as amended, 42 U. S. C. § 601 *et seq.*, Defendant Lloyd W. McCorkle, as Commissioner of the Department of Institutions and Agencies of the State of New Jersey, has promulgated or caused to be promulgated an interpretative regulation construing the eligibility requirements of the General Public Assistance Law, that all applicants be "* * * persons [who] are willing to work, but are unable to secure employment due either to physical disability or inability to find employment * * *", N. J. S. A. 44:8-108, as including individuals who voluntarily leave their employment for the purpose of directly and actively engaging in and participating in an economic strike against their employer.

11. Plaintiffs are informed, believe and therefore aver that Defendant Lloyd W. McCorkle, as Commissioner of the Department of Institutions and Agencies of the State of New Jersey, has further construed and interpreted the aforesaid interpretative regulation, promulgated under the General Public Assistance Law, as also authorizing the grant of public welfare benefits under the Assistance to Dependent Children Law, N. J. S. A. 44:10-1 *et seq.*, to individuals and the families of individuals who voluntarily leave their employment for the purpose of directly and actively engaging in and participating in an economic strike against their employer.

12. Plaintiffs are informed, believe and therefore aver that Defendant Irving J. Engelman, as Director of the Division of

Public Welfare of the Department of Institutions and Agencies of the State of New Jersey, is charged with the responsibility for the state wide administration and enforcement of the aforesaid interpretative regulation and that, in such capacity, he is currently implementing and executing such regulation through and by means of the county welfare boards and local assistance boards established in the State of New Jersey.

13. The General Public Assistance Law, N. J. S. A. 44:8-107 *et seq.* is administered in and for the City of Camden, New Jersey by Defendant Juanita E. Dicks as Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey. The manner in which said Statute is administered by Defendant Dicks is typical of the manner in which it is administered by all other Welfare Directors of Municipal Welfare Departments or Local Assistance Boards throughout the State of New Jersey. The Assistance for Dependent Children Law, N. J. S. A. 44:10-1 *et seq.* is administered in and for the County of Camden, New Jersey, by Defendant Fred L. Streng as Director of the Camden County, New Jersey Welfare Board. The manner in which said Statute is administered by Defendant Streng is typical of the manner in which it is administered by all other Directors of County Welfare Boards throughout the State of New Jersey.

14. Plaintiffs believe and therefore aver that the payment by the State of New Jersey through its instrumentalities and political subdivisions, pursuant to the aforesaid interpretative regulation, of public assistance and public welfare benefits to individuals and the families of individuals who voluntarily leave their employment to directly engage in and actively participate in an economic strike against their employer, interferes with and infringes upon free collective bargaining as guaranteed to Plaintiffs by Congress under the Labor-Management Relations Act of 1947, as amended, 29 U. S. C. § 141 *et seq.*; constitutes an intrusion by the State of New Jersey into the field of labor-management relations which Congress has pre-

empted and occupied to the full extent of its powers; and, accordingly, violates Article VI, Clause 2 of the Constitution of the United States.

15. Plaintiffs believe and therefore aver that, unless restrained and enjoined from implementing or giving any effect to the aforesaid interpretative regulation, Defendants Lloyd W. McCorkle and Irving J. Engelman will continue to authorize and direct, and Defendants Fred L. Streng and Juanita E. Dicks will continue to grant and make, public assistance and public welfare payments to those individuals and the families of those individuals, represented by Teamsters Local Union No. 676, who have voluntarily left their employment with Plaintiffs for the purpose of, and who are today, directly and actively engaging in an economic strike against Plaintiffs.

16. Plaintiffs are without an adequate remedy at law and are suffering irreparable injury as a result of Defendants' aforesaid actions.

17. Plaintiffs' employees, represented by Teamsters Local Union No. 676, who are on strike and who have applied for and received, or may apply for and receive, public assistance and public welfare benefits under the aforesaid New Jersey statutes, by virtue of the challenged interpretative regulation, have not been joined by Plaintiffs as parties to this action because such persons are too numerous and because joinder would, in any event, unduly delay the hearing of this action to the irreparable harm of Plaintiffs.

Wherefore, Plaintiffs Super Tire Engineering Company and Supercap Corporation pray that this Court:

(a) Adjudge, decree and declare that the aforesaid interpretative regulation promulgated or caused to be promulgated by Defendant Lloyd W. McCorkle as Commissioner of the Department of Institutions and Agencies of the State of New Jersey is null and void and of no force or effect whatsoever because it constitutes an interference with, and impingement upon, free collective bargaining as guaranteed to Plaintiffs by Congress under the Labor-Management Relations Act of 1947,

as amended, 29 U. S. C. § 141 *et seq.;* because it constitutes an intrusion by the State of New Jersey into the field of labor-management relations which Congress has pre-empted and occupied to the full extent of its powers; and because it, accordingly, violates Article VI, Clause 2 of the Constitution of the United States;

(b) Preliminarily and thereafter permanently enjoin and restrain Defendants Lloyd W. McCorkle, as Commissioner of the Department of Institutions and Agencies of the State of New Jersey, Irving J. Engelman, as Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey, Fred L. Streng, as Director of the Camden County, New Jersey Welfare Board, and Juanita E. Dicks, as Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey, and any and all persons acting on behalf of any one of the aforesaid Defendants, or on behalf of the State of New Jersey or the County or City of Camden, from giving any force or effect to, authorizing or directing compliance with, or granting or making public assistance or public welfare benefit payments of any nature whatsoever pursuant to or by virtue of, the aforesaid unlawful and invalid interpretative regulation;

(c) Grant to Plaintiffs such other and further relief as this Court shall deem appropriate.

Count II

Super Tire Engineering Company; Supercap Corporation; and A. Robert Schaevitz

v.

Lloyd W. McCorkle; Irving J. Engelman; Fred L. Streng; and Juanita E. Dicks

18. Plaintiffs incorporate herein by reference each and every allegation of paragraphs 1-3, 5-13 and 15-17 of Count I of this Complaint.

19. This action arises under Article VI, Clause 2 of the Constitution of the United States and the Social Security Act of 1935, as amended, 42 U. S. C. § 601 *et seq.* This Court has jurisdiction of this action pursuant to 28 U. S. C. §§ 1331 and 2201; the matter in controversy exceeds the sum of $10,000, exclusive of interest and costs.

20. Plaintiffs believe and therefore aver that the aforesaid interpretative regulation promulgated or caused to be promulgated by Defendant Lloyd W. McCorkle, as Commissioner of the Department of Institutions and Agencies of the State of New Jersey, authorizing the payment of public assistance and public welfare benefits to economic strikers conflicts with and is contrary to Sub-Chapter IV of the Social Security Act of 1935, as amended, 42 U. S. C. §§ 602(a)(C), 606(e)(1) and 607(b)(1)(B); conflicts with and is contrary to the legislative purpose and intent of Congress in enacting Sub-Chapter IV, 42 U. S. C. § 601 *et seq.;* accordingly violates Article VI, Clause 2 of the Constitution of the United States; conflicts with and is contrary to the Assistance to Dependent Children Law of the State of New Jersey, N. J. S. A. 44:10-1 *et seq.*, which as an approved State plan in part funded by the United States must conform with the requirements and restrictions of Sub-Chapter IV of the federal Social Security Act; and conflicts with and is contrary to both the General Public Assistance Law, N. J. S. A. 44:8-107 *et seq.*, and the Unemployment Compensation Act of the State of New Jersey, N. J. S. A. 43:21-1 *et seq.*, the latter of which expressly prohibits payments of benefits to economic strikers.

Wherefore, Plaintiffs Super Tire Engineering Company, Supercap Corporation, and A. Robert Schaevitz pray that this Court:

(a) Adjudge, decree and declare that the aforesaid interpretative regulation promulgated or caused to be promulgated by Defendant Lloyd W. McCorkle, as Commissioner of the Department of Institutions and Agencies of the State of New Jersey,

is null and void and of no force or effect whatsoever because it conflicts with and is contrary to Sub-Chapter IV of the Social Security Act of 1935, as amended, 42 U. S. C. §§ 602(a)(C), 606(e)(1) and 607(b)(1)(B); because it conflicts with and is contrary to the legislative purpose and intent of Congress in enacting Sub-Chapter IV, 42 U. S. C. § 601 *et seq.;* because it violates Article VI, Clause 2 of the Constitution of the United States; because it conflicts with and is contrary to the Assistance to Dependent Children Law of the State of New Jersey, N. J. S. A. 44:10-1 *et seq.;* and because it conflicts with and is contrary to both the General Public Assistance Law, N. J. S. A. 44:8-107 *et seq.*, and the Unemployment Compensation Act, N. J. S. A. 43:21-1 *et seq.*, of the State of New Jersey.

(b) Preliminarily and thereafter permanently enjoin and restrain Defendants Lloyd W. McCorkle, as Commissioner of the Department of Institutions and Agencies of the State of New Jersey, Irving J. Engelman, as Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey, Fred L. Streng, as Director of the Camden County, New Jersey Welfare Board, and Juanita E. Dicks, as Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey, and any and all persons acting on behalf of any one of the aforesaid Defendants, or on behalf of the State of New Jersey or the County or City of Camden, from giving any force or effect to, authorizing or directing compliance with, or granting or making public assistance or public welfare benefit payments of any nature whatsoever pursuant to or by virtue of, the aforesaid unlawful and invalid interpretative regulation;

(c) Grant to Plaintiffs such other and further relief as this Court shall deem appropriate.

Count III

Super Tire Engineering Company; Supercap Corporation; and A. Robert Schaevitz

vs.

Lloyd W. McCorkle; Irving J. Engelman, Fred L. Streng; and Juanita E. Dicks

21. Plaintiffs incorporate herein by reference each and every allegation of paragraphs 1-3 of Count I of this Complaint.

22. This Court has jurisdiction of this action pendent to the causes of action asserted in Counts I and II of this Complaint.

23. Both the General Public Assistance Law of the State of New Jersey, N. J. S. A. 44:8-107 *et seq.*, and the Assistance to Dependent Children Law of the State of New Jersey, N. J. S. A. 44:10-1 *et seq.*, as the federal Social Security Act of 1935, as amended, 42 U. S. C. § 601 *et seq.*, require:

(a) That a prompt inquiry be made into every applicant's circumstances, resources and income in order to determine financial eligibility, N. J. S. A. 44:1-87, 44:4-82, 44:8-121, 125, 44:10-2-3;

(b) That the applicant, or the parent or relative with whom the dependent child is living, immediately register for work with the State Employment Service and that the applicant and the administering State or local government agency promptly and actively seek to locate employment for such individual, N. J. S. A. 44:1-94, 44:4-86, 87, 44:8-118, 44:10-1-3;

(c) That, thereafter, periodic investigations of every individual receiving public assistance or public welfare benefits be made on a regular basis in order to determine continuing eligibility or a change in circumstances resulting in disqualification, N. J. S. A. 44:4-86, 44:8-118, 127, 44:10-2-3;

(d) That, thereafter, reimbursement be sought by the State or local government administering agency from any recipient

who is found to possess property, real or personal, in excess of that necessary for his or his dependent children's maintenance or support, N. J. S. A. 44:1-95, 44:4-91, 91.2, 44:8-140, 44:10-2, 4.

24. Plaintiffs believe and therefore aver that despite the aforesaid restrictions and requirements of the aforesaid Statutes of New Jersey, neither Defendant Lloyd W. McCorkle, as Commissioner of the Department of Institutions and Agencies of the State of New Jersey, nor Defendant Irving J. Engelman, as Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey, whose duty and legal responsibility it is to require compliance therewith, are enforcing or taking legally adequate measures to assure enforcement of the said statutory restrictions and requirements, in violation of the duties and obligations of their respective offices, and in abuse of any official discretion possessed by them, and that, unless ordered and directed by this Court to do so, said Defendants will continue to ignore or otherwise fail to take those measures necessary to assure proper enforcement of the said statutory restrictions and requirements.

25. Plaintiffs believe and therefore aver that despite the aforesaid restrictions and requirements of the aforesaid Statutes of New Jersey, neither Defendant Fred L. Streng, as Director of the Camden County Welfare Board, nor Defendant Juanita E. Dicks, as Welfare Director of the Municipal Welfare Department of the City of Camden, are properly executing, complying with, or administering the aforesaid statutory restrictions and requirements, in violation of the duties and obligations of their respective offices, and in abuse of any official discretion possessed by them, and that, unless ordered and directed to do so, said Defendants will continue to ignore or otherwise fail

properly to execute, comply with, and administer the said statutory restrictions and requirements.

26. Plaintiffs are without an adequate remedy at law and, as citizens and taxpayers of the County of Camden and State of New Jersey, are suffering irreparable injury as a result of Defendants' aforesaid improper conduct.

Wherefore, Plaintiffs Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz pray that this Court:

(a) Issue and grant a preliminary and, thereafter, permanent mandatory injunction ordering and directing Defendant Lloyd W. McCorkle, as Commissioner of the Department of Institutions and Agencies of the State of New Jersey, and Defendant Irving J. Engelman, as Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey, and any and all persons acting on their behalf, to take such action as the Court shall determine necessary to the end that the aforesaid restrictions and requirements contained in the General Public Assistance Law, N. J. S. A. 44:8-107 *et seq.*, and the Assistance to Dependent Children Law, N. J. S. A. 44:10-1 *et seq.*, of the State of New Jersey are enforced and effectuated in conformity with the State legislature's expressed intent;

(b) Issue and grant a preliminary and, thereafter, permanent mandatory injunction ordering and directing Defendant Fred L. Streng, as Director of the Camden County Welfare Board, and Defendant Juanita E. Dicks, as Welfare Director of the Municipal Welfare Department of the City of Camden, and any and all persons acting on their behalf, to execute, comply with, and abide by, the aforesaid restrictions and re-

quirements contained in the General Public Assistance Law, N. J. S. A. 44:8-107 *et seq.*, and the Assistance to Dependent Children Law, N. J. S. A. 44:10-1 *et seq.*, of the State of New Jersey, in their administration of the aforesaid Statutes of New Jersey;

(c) Grant to Plaintiffs such other and further relief as the Court shall deem appropriate.

/s/ Herbert G. Keene, Jr.
Herbert G. Keene, Jr.
Stradley, Ronon, Stevens & Young
1300 Two Girard Plaza
Philadelphia, Pa. 19102
Telephone: 215-LO 9-3800

/s/ David F. Norcross
David F. Norcross
Archer, Greiner, Hunter & Read
518 Market Street
Camden, New Jersey
Telephone: 963-7979

Attorneys for Plaintiffs

Commonwealth of Pennsylvania }
County of Philadelphia }

A. Robert Schaevitz, being duly sworn according to law, deposes and says that he is President and Chief Executive Officer of Super Tire Engineering Company and Supercap Corporation and is one of the Plaintiffs herein and that the facts set forth in the foregoing Complaint are true and correct to the best of his knowledge, except as to those matters averred on information and belief, and as to such matters, they are true and correct to the best of his information and belief.

/s/ A. Robert Schaevitz
A. Robert Schaevitz

Sworn to and subscribed before me this 9th day of June, 1971.

/s/ Helen M. Schmid
Notary Public

My Commission Expires: May 19, 1975.

IN THE UNITED STATES DISTRICT COURT

* * (Caption—853-71) * *

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz respectfully move this Court, pursuant to Rule 65, F. R. Civ. P., to issue a Preliminary Injunction, after hearing, against Defendants Lloyd W. McCorkle, Irving J. Engelman, Fred L. Streng and Juanita E. Dicks:

(a) Preliminarily enjoining and restraining Defendant Lloyd W. McCorkle, as Commissioner of the Department of Institutions and Agencies of the State of New Jersey, Defendant Irving J. Engelman, as Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey, Defendant Fred L. Streng, as Director of the Camden County, New Jersey Welfare Board, and Defendant Juanita E. Dicks, as Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey, and any and all persons acting on behalf of any one of said Defendants, or on behalf of the State of New Jersey or the County or City of Camden, from giving any force or effect to, authorizing or directing compliance with, or granting or making public assistance or public welfare benefit payments of any nature whatsoever, pursuant to or by virtue of, that certain interpretative regulation promulgated or caused to be promulgated by Defendant McCorkle, construing the eligibility requirement of the General Public Assistance Law, N. J. S. A. 44:8-108, that all applicants be " * * * persons [who] are willing to work, but are unable to secure employment due either to physical dis-

ability or inability to find employment * * * ", as including as eligible applicants individuals who voluntarily leave their employment for the purpose of directly and actively engaging in and participating in an economic strike against their employer;

(b) Preliminarily ordering and directing Defendant Lloyd W. McCorkle, as Commissioner of the Department of Institutions and Agencies of the State of New Jersey, and Defendant Irving J. Engelman, as Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey, and any and all persons acting on their behalf, to take such action as the Court shall determine necessary to the end that the restrictions and requirements contained in the General Public Assistance Law, N. J. S. A. 44:8-107 *et seq.*, and the Assistance to Dependent Children Law, N. J. S. A. 44:10-1 *et seq.*, of the State of New Jersey, with regard to (i) initial investigation, N. J. S. A. 44:1-87, 44:4-82, 44:8-121, 125, 44:10-2-3; (ii) securing of employment, N. J. S. A. 44:1-94, 44:4-86, 87, 44:8-118, 44:10-1-3; (iii) continuing periodic investigation, N. J. S. A. 44:4-86, 44:8-118, 127, 44:10-2-3; and (iv) reimbursement, N. J. S. A. 44:1-95, 44:4-91, 91.2, 44:8-140, 44:10-2, 4, are enforced and effectuated in conformity with the State Legislature's express intent;

(c) Preliminarily ordering and directing Defendant Fred L. Streng, as Director of the Camden County Welfare Board, and Defendant Juanita E. Dicks, as Welfare Director of the Municipal Welfare Department of the City of Camden, and any and all persons acting on their behalf, to execute, comply with, and abide by, the restrictions and requirements contained in the General Public Assistance Law, N. J. S. A. 44:8-107 *et seq.*, and the Assistance to Dependent Children Law, N. J. S. A. 44:10-1 *et seq.*, of the State of New Jersey, with reference to

those matters specifically identified by citation in paragraph (b) hereof, in their administration of said statutes of the State of New Jersey.

Respectfully submitted,

/s/ Herbert G. Keene, Jr.
Herbert G. Keene, Jr.
Stradley, Ronon, Stevens & Young
1300 Two Girard Plaza
Philadelphia, Pa. 19102
Telephone: 215-LO 9-3800

/s/ David F. Norcross
David F. Norcross
Archer, Greiner, Hunter & Read
518 Market Street
Camden, New Jersey
Telephone: 963-7979
Attorneys for Plaintiffs

State of New Jersey
County of Camden } ss

AFFIDAVIT

A. Robert Schaevitz, being duly sworn according to law, deposes and says that:

He is President and Chief Executive Officer of Super Tire Engineering Company and Supercap Corporation, is one of the Plaintiffs herein, and is a citizen and taxpayer of the United States and of the County of Camden and the State of New Jersey.

Super Tire Engineering Company and Supercap Corporation are engaged in commerce as defined in Section 2(6) of the Labor-Management Relations Act of 1947, as amended, 29 U. S. C. § 152(6). Teamsters Local Union No. 676, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is certified by the National Labor Relations Board as the exclusive collective bargaining representative for all production and maintenance employees employed by Super Tire Engineering Company and Supercap Corporation.

At midnight on May 14, 1971, upon the expiration of the collective bargaining agreement, which had been in force since May 15, 1968, between Super Tire Engineering Company and Supercap Corporation and Teamsters Local Union No. 676, all the production and maintenance employees employed by Super Tire Engineering Company and Supercap Corporation, and represented by Teamsters Local Union No. 676, struck their employers as a result of the parties' failure to reach a new agreement, and all said employees have remained out of work in support of their bargaining demands to date.

He is informed and believes that subsequent to May 14, 1971, and continuing to date, many of the aforesaid employees, represented by Teamsters Local Union No. 676, who are di-

rectly engaged in and actively participating in the aforesaid economic strike against Super Tire Engineering Company and Supercap Corporation, have applied for and have received, or are about to apply for and receive, public assistance and public welfare benefits under the General Public Assistance Law, N. J. S. A. 44:8-107 *et seq.*, and the Assistance for Dependent Children Law, N. J. S. A. 44:10-1 *et seq.*, of the State of New Jersey.

He is informed and believes that public assistance is available under the General Public Assistance Law, N. J. S. A. 44:8-107 *et seq.*, to needy persons only "* * * where such persons are willing to work but are unable to secure employment due either to physical disability or inability to find employment * * * ."

He is informed and believes that public assistance is available under the Assistance for Dependent Children Law, N. J. S. A. 44:10-1 *et seq.*, to needy dependent children and the parent(s) or relative(s) with whom they are living only where the individual, parent or relative has not without good cause terminated his employment or has not without good cause refused to accept a bona fide offer of employment.

He is informed and believes that, contrary to the aforesaid restrictions contained in the aforesaid Statutes, Defendant Lloyd W. McCorkle, as Commissioner of the Department of Institutions and Agencies of the State of New Jersey, has promulgated or caused to be promulgated an interpretative regulation construing the eligibility requirement of the General Public Assistance Law, that all applicants be "* * * persons [who] are willing to work, but are unable to secure employment due either to physical disability or inability to find employment * * *", N. J. S. A. 44:8-108, as including as eligible applicants individuals who voluntarily leave their employment for the purpose of directly and actively engaging in and participating in an economic strike against their employer.

He is informed and believes that Defendant Lloyd W. McCorkle, in his official capacity, has further construed the said interpretative regulation as also authorizing the grant of public welfare benefits under the Assistance to Dependent Children Law, N. J. S. A. 44:10-1 *et seq.* to individuals and the families of individuals who voluntarily leave their employment for the purpose of directly and actively engaging in and participating in an economic strike against their employer.

He is informed and believes that Defendant Irving J. Engelman, as Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey, is currently implementing and executing such regulation through and by means of the County Welfare Boards and Local Assistance Boards established in the State of New Jersey.

He is informed and believes that the aforesaid interpretative regulation is currently being administered and executed in the City and County of Camden, New Jersey by Defendant Juanita E. Dicks, as Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey, and by Defendant Fred L. Streng, as Director of the Camden County, New Jersey Welfare Board and that the manner in which said regulation and the aforesaid statutes is administered by Defendants Dicks and Streng is typical of the manner in which they are administered by all other directors of county welfare boards and welfare directors of municipal welfare departments and local assistance boards throughout the State of New Jersey.

Upon the advice of counsel, he believes that the payment by the State of New Jersey through its instrumentalities and political subdivisions, pursuant to the aforesaid interpretative regulation, of public assistance and public welfare benefits to individuals and the families of individuals who voluntarily leave their employment to directly engage in and actively participate in an economic strike against their employer, interferes with and infringes upon free collective bargaining as guaranteed by Congress to Super Tire Engineering Company and Supercap

Corporation and all other employers engaged in or affecting interstate commerce under the Labor-Management Relations Act of 1947, as amended, 29 U. S. C. § 141 *et seq.*; constitutes an intrusion by the State of New Jersey into the field of Labor-Management relations which Congress has preempted and occupied to the full extent of its powers; and, accordingly, violates Article VI, Clause 2 of the Constitution of the United States.

He is informed and believes that, unless restrained and enjoined by this Court from implementing or giving any effect to the aforesaid interpretative regulation, Defendants Lloyd W. McCorkle and Irving J. Engelman will continue to authorize and direct, and Defendants Fred L. Streng and Juanita E. Dicks will continue to grant and make, public assistance and public welfare payments to those individuals and the families of those individuals, represented by Teamsters Local Union No. 676, who have voluntarily left their employment with Super Tire Engineering Company and Supercap Corporation for the purpose of, and who are today, directly and actively engaging in an economic strike against said employers.

He believes that the payment of welfare benefits and public assistance to the striking employees of Super Tire Engineering Company and Supercap Corporation has unquestionably hardened the resolve of the said strikers to remain out of work in support of their bargaining demands; that, as a result thereof, the current strike will undoubtedly be of longer duration than would have otherwise been the case; that the impact of the grant of welfare benefits and public assistance to the strikers involved has resulted in the State of New Jersey subsidizing one party to the current labor dispute; and that such subsidization by the State has resulted in upsetting the economic balance between employer and employees otherwise obtained in such a labor dispute.

As a result of the aforesaid actions of the Defendants, Super Tire Engineering Company and Supercap Corporation are suf-

fering irreparable injury; further, said corporations are without an adequate remedy at law.

He is authorized to take this Affidavit on behalf of both Super Tire Engineering Company and Supercap Corporation.

Upon the advice of counsel, he believes that the payment of public assistance and public welfare benefits to economic strikers conflicts with and is contrary to Sub-Chapter IV of the Social Security Act of 1935, as amended, 42 U. S. C. § 601 *et seq.*; accordingly, violates Article VI, Clause 2 of the Constitution of the United States; and conflicts with and is contrary to the Assistance to Dependent Children Law of the State of New Jersey, N. J. S. A. 44:10-1 *et seq.*, the General Public Assistance Law, N. J. S. A. 44:8-107 *et seq.*, and the Unemployment Compensation Act of the State of New Jersey, N. J. S. A. 43:21-1 *et seq.*

He believes that the restrictions and requirements contained in the General Public Assistance Law of the State of New Jersey, N. J. S. A. 44:8-107 *et seq.* and the Assistance to Dependent Children Law of the State of New Jersey, N. J. S. A. 44:10-1 *et seq.* with reference to initial investigation, location of employment, continuing periodic investigation, and reimbursement, which provisions are more specifically set forth in the Complaint herein, are not properly being enforced by appropriate and adequate measures by either Defendant Lloyd W. McCorkle or Defendant Irving J. Engelman, in violation of the duties and obligations of their respective offices and that, unless ordered and directed by this Court to do so, said Defendants will continue to fail to properly and adequately enforce such statutory restrictions and requirements.

He further believes that neither Defendant Fred L. Streng nor Defendant Juanita E. Dicks are properly executing, complying with or administering the same statutory restrictions and requirements, more specifically enumerated in the Complaint, in violation of the duties and obligations of their respective

offices and that, unless ordered and directed to do so by this Court, said Defendants will continue to fail properly to execute, comply with and administer such statutory restrictions and requirements.

He, as well as Super Tire Engineering Company and Supercap Corporation, are without adequate remedy at law and, as citizens and taxpayers of the United States and of the County of Camden and of the State of New Jersey, are suffering irreparable injury as a result of the Defendants' aforesaid action and inaction.

The facts set forth herein are true and correct to the best of his knowledge except as to those matters asserted on information and belief and with respect to those matters, they are true and correct to the best of his information and belief.

/s/ A. Robert Schaevitz
A. Robert Schaevitz

Sworn to and subscribed before me this 10th day of June, 1971.

/s/ Ruth Norwitz
Notary Public

My Commission Expires: 9/28/75.

IN THE UNITED STATES DISTRICT COURT

• • (Caption—853-71) • •

ORDER

And Now, this 14th day of June, 1971, it is hereby Ordered that hearing be held before the Court on Plaintiffs' Motion for a Preliminary Injunction herein on the 24th day of June, 1971 at 10:00 A. M. in Court Room 2, United States Court House, 401 Market Street, Camden, New Jersey.

/s/ John J. Kitchen
U. S. D. J.

UNITED STATES DISTRICT COURT

* * (Caption—853-71) * *

Before:

Honorable John J. Kitchen, U. S. D. J.

Appearances:

Archer, Greiner, Hunter & Read, Esqs.,
By: David F. Norcross, Esq.,

Stradley, Ronon, Stevens & Young, Esqs.
By: Herbert G. Keene, Jr., Esq.,
Attorneys for Plaintiffs,

Plone, Tomar, Parks & Seliger, Esqs.,
By: Robert F. O'Brien, Esq.,
Attorney for Defendant Intervenor Teamsters Local 676

Daly D. E. Temchine, Esq.,
Attorney for Defendants McCorkle and Engelman

William D. Dilks, Esq.,
Attorney for Defendant Director of Welfare of Camden County.

Isaih Steinberg, Esq.,
Attorney for Defendant Director of Welfare of Municipal Welfare Department of the City of Camden.

Dorothy C. Pavlik Boss
Certified Shorthand Reporter

[3] The Court: Gentlemen, this is the return day for a hearing on motion by the plaintiffs, Super Tire Engineering Company and others versus Lloyd W. McCorkle, et als. for preliminary injunction; civil action 853-71. Are we ready to proceed?

Mr. O'Brien: Yes, your Honor.

The Court: Gentlemen, I understand we have some motions before we proceed. Is that correct?

Mr. Temchine: Yes, sir.

Mr. O'Brien: My name is Robert F. O'Brien, and I think, we should have it on the record, we represent the applicant intervener, Teamsters Local 676, which will be affected by the results of any decision here. We would formally move at this time to intervene, your Honor.

The Court: All right. We have discussed that and there is no objection. Your motion is granted.

Now, what other motions do we have?

Mr. Temchine: Your Honor, my name is Daly Temchine and I am here on behalf of the defendants McCorkle and Engelman. I [4] would like at this time to make a motion to dismiss on the grounds that this complaint does not state a cause of action cognizable before this Court, specifically under its jurisdiction of 28 U. S. C. Section 1337, which gives this Court original jurisdiction over causes arising under statutes relating to commerce, is not applicable to this case, because, in fact, this cause arises under the Social Security Act and not under the N. L. R. A.

The Court: Any other motions, Gentlemen?

Mr. O'Brien: Before any testimony is presented, we believe this case is not one, which is properly before this Court at this time. Your Honor, we have reference to a case of I. T. T. versus Minter, which has come out of the First Circuit in December, 1970. That case, your Honor, we think is dispositive of the claim, which is put before you by the plaintiff. What plaintiff is seeking here is the taking of testimony on this particular point as to the conflict between State action insofar as it would interfere or upset the balance, [5] as supposedly set down in the Federal statutes. We believe, your Honor, that this I. T. T. case is dispositive of the entire matter.

The Court there, Judge Coffin speaks of the particular forum where certain things should be developed. The particular forum, which Judge Coffin talks about in that case is the forum of Congress. The Judge in the case sets out a series of criteria, which should be considered by a Court or by an adjudicatory body setting out those criteria. He then goes out to point out that the Congress itself would be in the best position to decide the type of issue, which is raised. I believe, it would be unfair—it is not fair to come into here and ask the Court today to take testimony under the particular subject matter of a State-Federal conflict, when in fact, this Court is not the forum to hear this type case to begin with. Additionally, your Honor, even if we were going to go into the merits of the case, I think, it is clear on its face, without the taking of any testimony, that the State [6] here has a legitimate interest in protecting its inhabitants from destitution and as such, the State should not even be forced to litigate its actions here, in providing welfare assistance to people who are needy. The fact that they are on strike, we believe, your Honor, does not deprive them of the benefits, which they should be entitled to. And to get into the balancing test, which Judge Coffin talks about, in the First Circuit Court, we believe, would clearly show—and I think just looking at the pleadings in this case, it is clearly seen that the balancing would weigh in favor of the State. The State should not be second guessed. We think, the complaint itself shows that the people cannot be granted any relief. The complaint talks about a conflict between State and Federal laws; while I think, that's clearly disposed of in the First Circuit Court opinion, wherein the First Circuit points out, there is no conflict here, that the State action is peripheral here for the federal scheme. The federal scheme sets [7] out certain labor statutes, which labor statutes define the conduct of the parties at the bargaining table and the conduct of the parties on the labor dispute. However, the State is allowed to interfere. The interfering with the labor, New Jersey has an anti injunction, in which New Jersey always becomes involved in a labor dispute.

I would submit, that is much more the heart of the matter and yet, that State action has never been said, that that State action is interference or is pre-empted by the federal scheme.

We'd also point out to the Court, that we believe that this entire matter concerning welfare benefits has been mooted we can represent to the Court and put in through competent testimony that, in fact, these employees voted to return to work and are scheduled to return to work tomorrow morning. What this complaint complains about is the payment of welfare benefits. Well, that's no longer a fact. Welfare benefits are no longer to be paid. In fact, they will be stopped. Any money [8] which these employees will receive, will be returned to the welfare department. So that the harm that's complained here by the plaintiff is one, which has been abrogated by the return to work. And we believe, that the question, therefore, would be mooted simply on this ground alone. The Norris LaGuardia Act, which is an underpinning of the federal policy against injunctions, that act states very clearly, that no injunction shall issue in any case arising out of a labor dispute. And Norris LaGuardia here forbids the type of relief, which is being sought by the plaintiff. The plaintiff here has no right to an injunction under the terms of Norris LaGuardia. This is a labor dispute; and to issue an injunction in a case, which arises or has its underpinning in a labor dispute, would violate that act. For all these reasons, your Honor, we would submit, that this case is one that can be disposed of on motion. I think, any of the motions, which we have cited to the Court, would make this [9] case to be disposed of for this Court.

Now, to entertain testimony on the plaintiff's motion, we believe is not fair to the Court, to take up the time and efforts and energy of the Court in hearing testimony, which should not properly be before the Court. These witnesses here should be before Congress, testifying before Congress. If Congress has any power in this matter, they are the ones, which should be exercising it to begin with if there is any State—Federal conflict.

But to take the time, take the energy of this Court, to weigh all the considerations, which are set out in Judge Coffin's opinion, is unfair, when Judge Coffin goes on in that opinion and says quite clearly, Congress is the forum. We would, therefore, ask that our motion to dismiss be granted.

The Court: Is there anything, Mr. O'Brien, in any of the regulations of Congress, which would prohibit the payment of welfare under circumstances such as this?

[10] Mr. O' Brien: The enabling act from what I understand, Social Security, which allows the monies to flow into the State, talks about good cause. But there's nothing in the statute, which defines good cause. Then, we get into the question, what is or is not good cause? Then, the First Circuit had the exact same question, whether or not an employee when he's left his employ, has left it for good cause? The First Circuit disposed of it by saying it is up to the State to ascertain good cause. Now from my understanding of the State policy, your Honor, the State sometimes finds that an individual is not eligible for welfare benefits if he is participating in an unlawful strike, a strike which has been declared by a Court to be a wild—cat or something in violation of collective bargaining agreement. There, the State would step in, make its finding under State law, that good cause was not present here when the employee left work. And, therefore, denied the employee the benefits. But here, this is a lawful strike, an economic strike at the expiration of a contract; and as [11] such, we would submit to the Court, that at this point there is no showing that there was not good cause when these people left work.

Mr. Temchine: I would like to add some additional points. Firstly, if there is any conflict involved in, this case is not a conflict between the State and Federal government it is a conflict between two federal statutes, the Social Security Act and the National Labor Relations Act and that is evidenced by the fact that the Social Security Act in it's welfare program is administered by the Department of Health, Education and Welfare.

Every single State, which participates in federal welfare programs, must submit a plan to H. E. W. the New Jersey plan, which includes the regulations which permit the collecting of welfare benefits to strikers was to submit to H. E. W.; and H. E. W. approved the State's plan. If we need any further indication that the federal government permits the collection of welfare [12] type benefits to strikers, it may be found in the Food Stamp Program, which is administered by the Department of Agriculture. Recently, in the Newark Teacher's strike, the question arose whether they were entitled to the food stamps. Communications were had with the Department of Agriculture and it was indicated to us, any striker, any one who is needy, qualified for food stamps.

Now as I say, this is a federal policy. If there is a conflict, it is between one federal statute and another and the Court is at a disadvantage, not having the participation of the Federal Government, should it choose to decide this issue and should it conclude the I. T. T. versus Minter, is not dispositive of the present course of action, which we feel it is.

The Court: Mr. Dilks, do you have anything you want to say?

Mr. Dilks: No, your Honor. We, on behalf of the Director of Welfare of Camden County, of course, we follow the mandates that come down from the Director of Welfare of the State of New [13] Jersey and we would join in the motions that have been made by both counsel and, of course, we will abide by whatever decision this Court renders with respect to the State of New Jersey; and we will abide whatever mandate comes from their office.

The Court: Mr. Steinberg.

Mr. Steinberg: Our position is essentially the same as Mr. Dilks. We administer welfare on behalf of the city, and in accordance with the statutes of the State of New Jersey and regulations promulgated by the Department of Institutions and Agencies of the State of New Jersey; and we are willing to abide

by any determination this Court might make with respect to the application of the plaintiffs.

The Court: Mr. Keene.

Mr. Keene: If I can reply briefly, I think Mr. O'Brien rather collectively (sic) [selectively] takes those portions of the I. T. T. case and Almacs case out of the District Court of Rhode Island, which I choose (sic) [he chooses] to rely on and very carefully ignoring other portions of those opinions that go against him. [14] For instance, I am rather familar with the I. T. T. case. Taking Mr. O'Brien's first point, the Court in that case indicates that a balancing approach to this question is the correct approach and quoting the Court's opinion, Judge Coffin said, "a Court would be interested in how many States permit strikers welfare." What's the impact of welfare on the collective bargaining situation? Any studies or expert testimony evaluating the impact of the eligibility—and I am here today prepared to introduce testimony on those issues as enumerated by Judge Coffin. Secondly, Mr. O'Brien refers to the fact that the strike was ended as of yesterday in that our latest contract was ratified by the Union Membership yesterday and they plan a return to work tomorrow. But what Mr. O'Brien apparently ignores is that that very same issue was presented to the First Circuit in the I. T. T. case and the First Circuit said, this was a question of recurring importance to the public and that a mere fact that the strike had been discontinued or [15] ended, would not moot the issue.

Mr. O'Brien then refers to the Norris LaGuardia Act in the State of New Jersey and says, this is a labor dispute and we can't issue an injunction in this kind of a case. That's not quite so either. If you take a look at the Almacs Case out of the District Court of Rhode Island, Judge Pettine indicates, neither the Federal Norris LaGuardia Act nor the various little Norris Acts in the State prevented an injunction from issuing in this kind of a case, because we were not enjoining a party to a labor dispute from doing anything. What we are seeking is an injunction against State officials, not a party to the labor dispute. Now, the

statute in New Jersey under which the particular regulation that's an issue was promulgated is not the statute that was enacted under the Federal Social Security Act. It is the General Assistance statute of the State of New Jersey, which is wholly State, County and Local, locally funded and the precise language contained in that [16] statute, is that public assistance is assistance rendered to needy persons not otherwise provided for under the laws of this State where such persons are willing to work, but are unable to secure employment, but (sic) [due] either to physical disability or inability to find employment. Our argument here today, is that they were not physically disabled and they were not without employment. They had it. The only reason why they chose not to accept it, was because they wanted better working terms and conditions.

The Court: What about the statement in the I. T. T. Case, Mr. Keene, dealing with whether there was fault or whether there was good cause for being absent and who makes that decision as far as whether welfare is to be given?

Mr. Keene: That question, your Honor, arises under the Aid to Dependent Children Act enacted by the State under the Federal Social Security Act. The Federal Social Security Act says that welfare will not be made available to anyone whose terminated [17] his employment within thirty days of the application or anyone who has, within that period of time, refused a bonafide offer of employment.

Now, the New Jersey Aid to Dependent Children Law enacted pursuant to that Federal statute, contains the precise same language. The First circuit indicated, that the mere refusal to go to work because you went out on an economic strike was not equivalent to saying, you have refused a bonafied offer of employment. By the same token, the First Circuit indicated that the converse wasn't true either. The fact that you went out on strike may or may not be good cause for refusing employment. I don't believe that the First Circuit really answered that question. It seemed to say, that each argument assumes the conclusion

that it is either a good cause or not good cause for not going to work, i.e., going out on strike. But the First Circuit I don't really believe precisely answered that question.

Our position here today is that the regulation that we are challenging was issued [18] under the General Assistance Law of the State of New Jersey. It's now been applied to the Aid to Dependent Children Program and it does conflict with both the General Assistance Laws as well as the Aid to Dependent Children Program of the State of New Jersey and the Federal Social Security Act.

I might also say in response to something that Mr. Temchine said, that jurisdiction is not founded under Federal Social Security Act, under count one of our complaint. It is, in fact, founded in the Labor Management Relations Act. The second count is founded in Federal jurisdiction on the Social Security Act, but not the first. Also, in reply to something else, which I believe, Mr. Temchine did touch on, I don't believe that the conflict is between Federal statutes. I think, reading the Federal Social Security Act fairly, it is completely consistent with the Labor Management Relations Act. The people have the absolute right to go out on strike, but they don't have a right to [19] receive welfare. The inconsistency develops when a State administrator then interprets his State plan as to permit the granting of welfare benefits to economic strikers. So, I am not challenging any inconsistency that might, in any event, appear between Federal statutes. What I am challenging is the State's interference with free collective bargaining number one; and secondly I am saying that the regulations violate the Federal Social Security Act and the other enactments of the State of New Jersey, the General Assistance Law and the Unemployment Compensation Law.

I might also call to your Honor's attention, the fact that as of July one, of this year, there is a new welfare statute that will be applicable in this State of New Jersey and that is to be known as Assistance to the Families of the Working Poor. That Act spe-

cifically provides in Section Three A, that where the absence or insufficiency of income or resources of an applicant is the result of a voluntary cessation of employment within 90 days prior [20] to the date of the application; that in that event, that applicant is not eligible and that is something of a change of the language between this new statute and the old statute. So, I think that the intent of Legislature of the State of New Jersey has recently been manifested in this new enactment.

The Court: Gentlemen, I am going to take a short recess and I am going to review that I. T. T. Case in view of your statements, at which time I will return and make the rulings on the motions.

(Court recessed.)

The Court: Gentlemen, as I understood our discussion before we came into Court, there was a desire to have this determined on the merits at this time. Is that right, Mr. Keene?

Mr. Keene: Yes.

The Court: Consolidated with the request for the injunction and so forth?

Mr. Keene: That's correct, sir.

The Court: Gentlemen, I have read for I don't know how many times, but I [21] have read again this I. T. T. Case, which has been referred to; and on the basis of that, the Court has determined not to take testimony. I accept the ruling of Judge Coffin's opinion in that case and I feel that that case, as I interpret it, is controlling, because I feel that any action in this matter such as those enumerated in the case and in which they said, they are going to be recovering, I feel, that such rulings or such testimony should be heard by Congress for whatever action they deem appropriate. On that basis, I am going to grant the motion to dismiss and of course, that will deny the injunction.

Mr. O'Brien, will you prepare the order since it is basically your motion.

(Whereupon the hearing was concluded.)

IN THE UNITED STATES DISTRICT COURT

* * (Caption—853-71) * *

This matter having come on for Final Hearing on the merits pursuant to F. R. C. P. 65(a)(2) on June 24, 1971;

And the Court having heard oral argument by counsel for all parties hereto;

And based upon existing law and for other good cause shown;

It is on this 13th day of July, 1971, Ordered that plaintiffs' Motion for Preliminary Injunction be and the same hereby is dismissed;

It is Further Ordered that the Complaint filed in this matter be and the same hereby is dismissed without costs.

/s/ John J. Kitchen
John J. Kitchen,
J. U. S. D. C.

July 13, 1971

UNITED STATES COURT OF APPEALS
For the Third Circuit

Super Tire Engineering Company; Supercap Corporation: and A. Robert Schaevitz,

Appellants,

vs.

Lloyd W. McCorkle, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; Irving J. Engelman, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; Fred L. Streng, Director of the Camden County, New Jersey, Welfare Board; Juanita E. Dicks, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: Teamsters Local Union No. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Appellees.

Appeal from the Judgment of the United States District Court for the District of New Jersey.

Nos. 71-1773, 71-1774 and 71-1775.

Argued September 14, 1972.

Before McLAUGHLIN, ADAMS and GIBBONS, *Circuit Judges.*

OPINION OF THE COURT

(Filed November 22, 1972)

ADAMS, *Circuit Judge.*

In this case, appellants claim three New Jersey welfare programs[1] that provide benefits to certain striking workers, violate the federal constitution, federal statutes and state statutes. Appellants,[2] alleging that their employees while engaged in an economic strike received aid under the challenged programs, sought an injunction restraining various New Jersey officials, appellees here,[3] from continuing to provide payments to the workers under these programs.

It is forcefully contended that these welfare programs directly interfere with free collective bargaining, a federal policy enunciated in the Labor Acts, 29 U. S. C. §§ 157-8, and are unconstitutional because they contravene the Supremacy Clause of the U. S. Constitution. They further assert that the inclusion of striking employees in the programs abridges the federal statute under which one of the programs is funded,[4] and the New Jersey

1. There has been considerable confusion over which welfare programs New Jersey currently operates. From oral argument and subsequent memoranda it appears that appellants are challenging the following three programs: Aid for Dependent Children (A. F. D. C.), N. J. S. A. 44:10-1 *et seq.*, a joint state-federal program; Aid to Families of the Working Poor, N. J. S. A. 44:13-1 *et seq.*, a state program; General Public Assistance, N. J. S. A. 44:8-107 *et seq.*, a state program.

2. Appellants, Super Tire Engineering Company and Supercap Corporation, are New Jersey corporations; appellant, A. Robert Schaevitz, is a citizen of and taxpayer of New Jersey, as well as president and chief executive officer of appellant corporations.

3. The Teamsters Local Union No. 676, the certified collective bargaining representative for all production and maintenance employees of the corporate-appellants, was granted permission by the District Court to intervene on behalf of the defendant-appellees.

4. A. F. D. C. is a joint federal-state program created by § 402 of the Social Security Act, 42 U. S. C. § 602.

statutes pursuant to which the state officials have promulgated regulations affecting striking employees.[5]

Critical to our disposition of the case, is the sequence of events. On May 14, 1971, at the conclusion of a three-year contract, negotiations having been to that point unfruitful, the employees began an economic strike. Shortly thereafter, as the employers allege, certain of the employees sought public assistance under one of the specific welfare programs. On June 10, 1971, the complaint giving rise to this litigation was filed, and on June 14 the District Court ordered that a hearing on the request for a preliminary injunction be held on June 24.[5a] At that hearing the state officials and the union moved to dismiss the employers' complaint pursuant to Rule 12b(6), F. R. Civ. P. The trial judge, persuaded by I. T. T. Lamp Division v. Minter, 435 F. 2d 989 (1st Cir. 1970), *cert. denied*, 402 U. S. 933, *rehearing denied*, 404 U. S. 874 (1971), on July 13 dismissed the complaint and the motion for a preliminary injunction.

The union states that the strike "ended immediately prior to the June 24, 1971 hearing." The employers allege that the "employees did not return to work until June 28, 1971." Under either factual situation, a new contract having been accepted and ratified,[5b] it is clear that the labor dispute undergirding this

5. The question whether the regulations governing each of the programs comport with the New Jersey statute under which they are promulgated is one of state law. Resolution of that issue might render unnecessary a decision on the basic constitutional challenges. In such circumstances, it is normally the duty of federal courts to abstain, awaiting a definitive pronouncement from a state court on questions of state law. We do not address this issue because it would not be reached until the Court determines that the case is within its jurisdiction. Railroad Commission v. Pullman Co., 312 U. S. 496 (1941).

5a. The jurisdiction of the District Court was alleged to be grounded on 28 U. S. C. § 1331 and § 1337. The applicability of § 1337 need not be discussed, for, it appearing that the amount in controversy exceeds $10,000, jurisdiction can be based on § 1331.

5b. At the hearing before the District Court on plaintiffs' motion for a preliminary injunction, the transcript of which appears as pages 52a-72a of the appendix filed by plaintiff-appellants, counsel for the plaintiffs stated:

challenge to the New Jersey programs had been concluded before the trial judge dismissed the action and long before appeals were filed or argued in this Court.

Although many important questions of law have been ably argued and briefed by both sides, it now appears to this Court that the resolution of the underlying labor dispute raises squarely the issue of mootness.

I.

Article III of the Constitution commands that the federal judicial power shall extend only to cases and controversies. Thus, lacking a case or controversy, the federal courts are without jurisdiction. In North Carolina v. Rice, 404 U. S. 244 (1971), the Supreme Court states explicitly that mootness is an article III jurisdictional issue, setting forth the fundamental considerations:

> "Although neither party has urged that this case is moot, resolution of the question is essential if federal courts are to function within their constitutional sphere of authority. Early in its history, this Court held that it had no power to issue advisory opinions, Hayburn's Case, 2 Dall. 409 (1792), as interpreted in Muskrat v. United States, 219 U. S. 346, 351-353 (1911), and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. Oil Workers Unions v. Missouri, 361 U. S. 363, 367 (1960). To be cognizable in a federal court, a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' Aetna Life Ins. Co. v.

". . . the strike was ended as of yesterday in that our latest contract was ratified by the Union Membership yesterday and they plan a return to work tomorrow." Appendix at 65a.

> Haworth, 300 U. S. 227, 240-41 (1937). However, '[m]oot questions require no answer.' Missouri, Kansas & Texas R. Co. v. Ferris, 179 U. S. 602, 606 (1900). Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions.' United States v. Alaska S. S. Co., 253 U. S. 113, 116 (1920), quoting California v. San Pablo & Tulare R. Co., 149 U. S. 308, 314 (1893); our impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' Liner v. Jafco, Inc., 375 U. S. 301, 306 n. 3 (1964). See also Powell v. McCormack, 395 U. S. 486, 496 n. 7 (1969). Even in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction. Henry v. Mississippi, 379 U. S. 443, 447 (1965). Liner v. Jafco, Inc., supra, at 304." 404 U. S. at 246.

Beyond these dictates, however, broad statements about mootness suffer the same infirmity as general discussions about most abstruse subjects.[6] Though mootness is a constitutional problem, an articulation of the specific parameters of the doctrine has never been assayed by the Supreme Court.[7] Rather, the doctrine of mootness is protean in nature, assuming different shapes at different times. Indeed, the recent cases confronting the issue would appear not to produce a unitary coherent line.

The problem of mootness presents a recurring refrain in several types of cases. Analysis of them reveals four concerns

6. In Association of Data Processing Service Organizations, Inc. v. Camp, 397 U. S. 150 (1970), Justice Douglas ascribed to discussions of standing a quality equally applicable to discussions of mootness. "Generalizations about standing to sue are largely worthless as such." *Id.* at 151.

7. *See generally*, Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672 (1970); Note, Cases Moot on Appeal: A Limit on the Judicial Power, 103 U. Pa. L. Rev. 772 (1955).

that the Supreme Court addresses in terms of mootness. They are: that some sort of judicial decree be possible, that the parties remain in a posture sufficiently adverse to insure effective litigation, that the issue in contention continue to be concrete, and that the issue not be one that will recur and yet be unreviewable. Beyond these observations, however, conclusions become difficult. This difficulty is at least in part attributable to the proximity of mootness to several other justiciability precepts, and the tendency of courts to become unclear as to just which doctrine is applicable. For example, the concern with sufficient adversity is related to the question of "standing," and the fear regarding loss of concreteness approaches ripeness. Further beclouding the problem is the seeming congruence, at times, of the jurisdictional requirements for declaratory judgments and the mootness doctrine. *See e.g.*, Golden v. Zwickler, 394 U. S. 103 (1969). In spite of the impediments involved in attempting to draw conclusions about the content of the mootness doctrine, the resolution of this case requires that the concerns to which mootness responds be developed.

The early mootness cases were bottomed on the Court's unwillingness to act unless it could issue a decree that would affect the legal rights of the parties to the litigation. There frequently was no discussion of the underpinning of the concept, but it is clear that the Court considered that the phrase "judicial power" encompassed situations only in which an effective decree could be rendered, or that such a situation was not a "case" or "controversy." In Singer Manufacturing Co. v. Wright, 141 U. S. 696 (1891), a Georgia tax was alleged to discriminate impermissibly between two classes of retailers. Singer brought suit to enjoin collection of the tax as levied against it. Before the appeal reached the Supreme Court, Singer, still pursuing the litigation, paid the tax. Although acknowledging that an action for restitution, which would raise the same issues, might lie, the Supreme Court dismissed the case as moot because nothing remained to be enjoined. *See*, Commercial Cable Co. v. Bur-

leson, 250 U. S. 360 (1919). *See generally,* Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672, 1674-5 (1970).

Much of the recent motion in the mootness field has occurred in cases involving convicted criminals who have been released from prison. The leading cases, separated by twenty-five years, illustrate the Court's shift from emphasis on an effective decree to a more functional approach in the context of a criminal situation, looking for sufficient interest and adversity between the parties. Both St. Pierre v. United States, 319 U. S. 41 (1943), and Sibron v. New York, 392 U. S. 40 (1968), were challenges brought by persons whose prison terms had been completed. In *St. Pierre,* the court dismissed as moot, stating:

> "On the argument it was conceded that petitioner had fully served his sentence before certiorari was granted. We are of opinion that the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate. A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. United States v. Alaska S. S. Co., 253 U. S. 113, 115-16, and cases cited; United States v. Hamburg-American Co., 239 U. S. 466, 475-77." 319 U. S. at 42.

See Parker v. Ellis, 362 U. S. 574 (1960). *Sibron,* however, was not held to be moot because, as the Court asserted, the brevity of the sentence made review before release impossible, and the enduring effects of the conviction assured that Sibron would diligently litigate the question, and in a concrete factual context. *See* Mancusi v. Stubbs, 408 U. S. 204 (1972). A lack of concreteness seemed the motivation for a finding of mootness in North Carolina v. Rice, *supra. See* Aikens v. California, 406 U. S. 813 (1972).

Another group of cases includes those in which something other than the passage of time creates the mootness problem.[8] This class of cases involves changed circumstances or voluntary cessation of a questioned activity. Thus, changing conditions have at times led to an invocation of the mootness doctrine. In Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U. S. 582 (1961), the enactment of an amendment to a Sunday-closing statute, plus the election of a new prosecutor were held to moot an assault on the "Blue Laws." In Golden v. Zwickler, *supra*, Zwickler was challenging a New York statute prohibiting the distribution of anonymous handbills. The handbills he desired to distribute attacked Congressman Multer, an incumbent running for reelection in 1964. Before the case was heard by the U. S. Supreme Court, Multer had become a Justice of the Supreme Court of New York. His target thus having been removed from active politics and unlikely to reappear, Zwickler's appeal was held not to be justiciable any longer.[9] These two cases exemplify the Court's concern both with the concreteness of the controversy and the continuing adverse nature of the parties. The same elements seem to be operative in SEC v. Medical Committee for Human Rights, 404 U. S. 403 (1972), where the ruling of the Commission that Dow need not include an anti-napalm proposal in its 1968 proxy solicitations was held no longer reviewable. The finding of mootness was based on Dow's voluntary inclusion of the proposal in its 1971 solicitation, the less-than-3% support that the proposal received at that time, and SEC regulations which permitted Dow to delete for three years a proposal with such limited support.[9a]

---

8. Cases dealing with elections that have taken place, orders that have expired before review, and injunctions that have lapsed, discussed *infra*, are a third type of case in which mootness occurs.

9. As discussed earlier, Golden v. Zwickler, *supra*, is not technically a mootness case but one poing a problem under the declaratory judgment act. Nevertheless, it is frequently cited as a mootness case.

9a. *See* Johnson v. New York State Educ. Dep't, 41 U. S. L. W. 4018 (U. S. Nov. 20, 1972).

The most frequently quoted cases of the voluntary cessation type are United States v. W. T. Grant & Co., 345 U. S. 629 (1953) and United States v. Trans-Missouri Freight Assn., 166 U. S. 290 (1897). Both involved conduct by defendants claimed to be in violation of the antitrust laws. The defendants, in each case, ceasing the allegedly illegal activity, urged that the proceedings brought by the government had thus become moot. In each case the Court, looking to the public interest in enforcement of the antitrust law, and the possibility that the defendants might repeat the questioned activity, held that the cases were not moot. The decisive considerations in *Grant* and *Trans-Missouri* are not as clear as in some other mootness cases. Nevertheless, the interest of the government in seeing that its laws not be evaded by the practice of ceasing questioned activity when challenged, assure that the government will be an active litigant. The fact that the questionable activity was being conducted at the start of the litigation appeared to aid the Court by providing a concrete controversy.

Another line of cases dealing with mootness is comprised of those in which the passage of time has caused the immediate object of the litigation to become unobtainable. Typical are disputes that in some way challenge election laws. In these cases a private citizen is the plaintiff and the government is the defendant. The mootness problem arises because the election has passed. Three cases in which this issue appeared have been held moot, Brockington v. Rhodes, 396 U. S. 41 (1969); Hall v. Beals, 396 U. S. 45 (1969); and Socialist Labor Party v. Gilligan, 406 U. S. 583 (1972). *Brockington* was a suit brought by a would-be candidate for Congress seeking a writ requiring the election board to list his name on the ballot, a step the board had refused to take since the nominating petitions filed by the aspirant were short of the required number of signatures. The Supreme Court stated that because the election was passed, the case was moot since the only relief sought was now unavailing. *Brockington* would appear to be a return, perhaps anachronistically, to the "effective decree" standard.

Hall was a challenge to Colorado's six-month residency requirement for voting. An amendment to the statute reducing the requirement to two months, and the passage of the election were held to moot the appeal. Since the amendment reducing the residency requirement would have permitted the plaintiffs to vote, and, they would be eligible to vote in the next election, this case is perhaps explained as a decision based on a lack of adversity.

In *Socialist Labor Party* the statute attacked as unconstitutional was amended, correcting many of the infirmities that had been alleged by the plaintiffs. The Socialist Labor Party attempted to keep their suit alive by pointing to an unamended oath provision. The Court, finding that the heart of the suit had been removed, refused to permit it to be pursued on this tangential issue.[10]

A greater number of cases wherein the election has passed have been held not moot. In Gray v. Sanders, 372 U. S. 368 (1963), Georgia's county-unit primary system was assailed. Though the use of the specific system had been enjoined in the district court, and the Democratic Party, whose primary was the one challenged, actually held the election on a popular basis, the Supreme Court did not find the case moot. The Court stated two reasons for proceeding to the merits. First, the district court's injunction regulated only the present election, and dismissal of the case would restore Georgia to the *status quo ante*, i.e., able to conduct future elections under the county-unit system. Second, citing United States v. W. T. Grant, *supra*, the Court held that the Democrats' voluntary abstention from the challenged activity did not guarantee such restraint in the next election. Though nowhere so articulated, this approach indi-

10. Similar to *Socialist Labor* is Diffenderfer v. Central Baptist Church, 404 U. S. 412 (1972). In *Diffenderfer*, the tax-exemption accorded a church owned parking lot under a Florida statute was questioned. After the statute was amended, the appeal reached the Supreme Court, which held that it would not decide speculative questions about the new statute, and that the matter was now moot. Both these cases thus seem to indicate that the Court will not act when the main issue has been resolved and only an incidental issue remains to be decided.

cates that if the activity contraverted is imbedded in a statute, rendering high the probability of repetition, and the complainants will suffer with each repetition, then there is sufficient adversity. *See* Bullock v. Carter, 405 U. S. 134, 141 n. 17 (1972). *See generally* Note, 83 Harv. L. Rev. at 1684-5.[11]

A final series of cases introduces another element into the mootness doctrine. These cases are brought by parties who suffer injury from effects of a short-lived government order. The Supreme Court has stated that if the impact of such order will always pass before review is possible, then the case is not moot, for a finding of mootness would foreclose any possibility of review. The progenitor of this type of suit is Southern Pacific Terminal Co. v. ICC, 219 U. S. 498 (1911). ICC had ordered Southern Pacific to cease giving preferences to certain shippers, the order to continue for two years. Southern Pacific's appeal from the order was not heard by the Supreme Court until after the two-year provision of the order had ended. Holding the case not moot, the Court stated that a finding of mootness would create a class of situations in which, because of the short duration of the directive, the government could engage in actions "capable of repetition, yet evading review." 219 U. S. at 515.

11. The Court in three recent election situations has held not moot cases on appeal after the election has passed. In Fortson v. Toombs, 379 U. S. 621 (1965), another case arising from Georgia, the Court vacated and remanded the decree of a three-judge district court, but did not hold the case moot. The vacation and remand, however, may well have been motivated by concerns approaching the concreteness element of the mootness doctrine.

Whitcomb v. Chavis, 403 U. S. 124 (1971), and Roudebush v. Hartke, 405 U. S. 15 (1972), arose in Indiana. In *Whitcomb*, a multi-member legislative-district plan was in question. Although after the election, the Court proceeded to decide this case because a finding of mootness followed by vacation of the lower court's order might result in the return of the challenged procedure and reinstitution of the lawsuit, which would raise the same issues.

In *Roudebush*, a suit involving the propriety of a state court's ordering a recount in a contest for the office of U. S. Senator, the constitutional issue of who is ultimately to judge the result of the race, the U. S. Senate or the state, remained clearly in contention, barring a finding of mootness.

Recent cases have relied on this doctrine. In *Moore* v. *Ogilvey*, 394 U. S. 814 (1969), the petitioners had raised a challenge to an Illinois requirement that a potential nominee amass signatures in fifty counties. Citing *Southern Pacific*, the Court held this case was justiciable, though the election had passed, for if the 50-county requirement were not tested, there would be a high degree of certainty that it would continue to be controlling from election to election. The same considerations preserved the justiciability of an attack upon a Tennessee residency-for-voting requirement in Dunn v. Blumstein, 405 U. S. 330, 333-4 n. 2 (1972).

In Carroll v. President and Commissioners of Princess Anne County, 394 U. S. 175 (1968), the prevention of potentially inflammatory "white supremacist" rallies by a ten-day injunction was on appeal in the Supreme Court. The impossibility of review of a ten-day injunction before its expiration and the persistence of the petitioners, both by pursuing the legal questions and by agitating with "continuing activities and programs," foreclosed a holding of mootness.

Having discussed these various components of the mootness doctrine, it remains to relate them to the assault on the "interpretive regulations" of New Jersey's welfare program presently before this Court. In many respects, this is a close case, with the arguments seeming to be nicely balanced.

The employers urged that they are suffering continuing injury from the mere existence of the welfare programs. Unless this argument is accepted, it appears that this case is moot. The only relief sought by the employers that could now be of any use would be a declaratory judgment. Though such a declaration might not be impermissible, the considerations encompassed in the mootness doctrine need be addressed.

Adversity must be judged by an objective standard. Here, absent a continuing injury, the posture of the plaintiffs may not be sufficiently antagonistic. As in *Hall* v. *Beals*, *supra*, one who has been injured but will be impaired only in the future if certain

speculative contingencies come to pass can no longer pursue the litigation. Moreover, the willingness of the state officials adequately to defend policies now threatened, not with an injunction, but only by a declaratory judgment, may be substantially diminished.[12] Having stated this, it is important to note the intervention of the Teamsters Union and the participation, *amicus curiae*, of the Chamber of Commerce of the United States. The presence of these parties does suggest an on-going interest in the issue raised in this litigation.

The procedural posture of this case makes it the antithesis of a "concrete" dispute. No testimony has been taken, no evidence adduced, no findings made. Thus, we are not faced with the prospect of stating that a lengthy trial must go for nought. Rather, we are asked to decide "questions of law" in somewhat of an abstract setting. Moreover, the real possibility of change in the regulations renders this case conjectural.[13]

Finally, we must deal with the contention that this is a government program "capable of repetition, yet evading review." As will be developed, infra, that contention was raised but not met in ITT v. Minter, *supra*. The presence, in that case, of a still active labor dispute raises doubts about the argument that this is a situation capable of evading review. *See* Russo v. Kirby, 453 F. 2d 548 (2d Cir. 1971). Nevertheless, cognizant of the time required to perfect appeals both to this Court and to the Supreme Court, review may be unavailable in the majority of cases such as this.

---

12. In W. T. Grant, *supra*, and Trans-Missouri, *supra*, defendants' willingness to defend can be assumed to have been motivated by a desire to avoid the type of relief sought by the government and a fear of subsequent private treble-damage actions, strong motivators indeed.

13. As plaintiff-appellants' complaint and memorandum in support of their motion for preliminary injunction make clear, their challenge is aimed at an interpretative regulation promulgated by defendant-Commissioner. Interpretative regulations are among the most rapidly changing of the oft-changed components of welfare programs.

Thus, to avoid holding that this case is moot, it must be found either that this appeal falls into the *Southern Pacific* category, or that the presence of the programs has an on-going direct effect on the appellants.

II.

The analysis of the mootness doctrine indicates that the continuing vitality of this case turns on two close issues: the "continuing effects" question and the *Southern Pacific* question. A resolution is, however, made simpler by a Supreme Court case, centrally important to determining the answers crucial to this appeal.

In Local No. 8-6, Oil, Chemical and Atomic Workers, Int'l. Union, AFL-CIO v. Missouri, 361 U. S. 363 (1960), the union, representing employees of a private company selling natural gas, chalienged the constitutionality of a Missouri statutory scheme, referred to as the King-Thompson Act. The Missouri legislation provided that, upon finding certain conditions present, the Governor could seize and operate a privately-owned public utility being struck, and that strikes against such facilities after the take-over would be unlawful. Having struck the gas company, that the Governor then seized, the employees were enjoined from further work stoppages, in accordance with the statutory program. The day after the injuction issued, the strike ended. One month later the underlying labor dispute was resolved and eleven weeks after that the seizure was terminated. The union continued to appeal the issuance of the injunction and sought a declaration that the Missouri statute was unconstitutional, interfering with the workings of the National Labor Relations Act—the basis of the Supremacy Clause claim both in *Oil Workers* and in the present appeal—and further alleging that there was a violation of the Due Process clause of the Fourteenth Amendment. Although the Missouri Supreme Court adjudicated the union's appeal on the merits, the United States Supreme Court held that the expiration of the injunction and settlement of the labor dispute rendered the case moot.

In Division 1287, Bus Employees v. Missouri, 374 U. S. 74 (1963), the same Missouri statute was challenged, there in the context of a labor dispute unsettled even when the case reached the Supreme Court. The Court, holding *Bus Employees* adjudicable, distinguished *Oil Workers* and Harris v. Battle, 348 U. S. 803 (1954), an earlier case relied on in *Oil Workers*, and stated that the resolution or continuation of the labor dispute was determinative of mootness.

> "Reliance for the claim of mootness is placed upon this Court's decisions in Harris v. Battle, 348 U. S. 803, and Oil Workers Unions v. Missouri, 361 U. S. 363. In the Oil Workers case the Court declined to consider constitutional challenges to the King-Thompson Act, and in the Harris case declined to rule on the constitutionality of a similar Virginia statute, on the ground that the controversies had become moot. *In both of those cases, however, the underlying labor dispute had been settled and new collective bargaining agreements concluded by the time the litigation reached this Court. Here, by contrast, the labor dispute remains unresolved.*" 374 U. S. at 77-8 (Emphasis added).

The employers here contend that, despite the settlement of the labor dispute, the present case is not moot. In support of their position they urge that the termination of the strike does not end the injury they suffer, but rather that their ability to bargain collectively with the union when the contract is terminated is hampered by the very existence of the welfare programs. They next claim that, since collective bargaining has been held to be an on-going process,[14] there is still an active dispute to be adjudicated, and that they continue to suffer injury.

14. Our attention has been called to the cases of Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275 (1946) and Aeronautical Industrial District Lodge 727 v. Campbell, 337 U. S. 521 (1949). Both cases dealt with the rights to reemployment of veterans returning from the Second World War. While it is clear that they can be said to stand for the proposition that collective bargaining is an on-going process, they do not address a problem similar to the one raised here and thus cannot be dispositive of the mootness problem.

The second argument crucial to avoiding dismissal for mootness maintains that this case should be considered in the limited, *Southern Pacific* class of cases "capable of repetition, yet evading review." In *ITT Lamp Division*[15] the Court of Appeals for the First Circuit was presented with a case quite similar to the present one.[16] Responding to the mootness issue, the First Circuit stated that the problem did indeed appear to be "close to the 'recurring question' category," citing *Southern Pacific*, 435 F. 2d at 991. The First Circuit, however, did not decide nor was it required to decide whether the issue was within the *Southern Pacific* ambit, for a second case, raising the same labor-welfare challenge, had already been joined on appeal, and in the latter case the strike had not yet been resolved.[17]

Oil Workers, however, responds to both questions essential to the employers' argument. In *Oil Workers*, just as in the present case, the threat to strike, labor's principal economic weapon, was affected by a state program. The employees in *Oil Workers* could have contended that their collective bargaining ability had been hindered by their employer's knowledge that a strike could

15. Appellants point out that the United States Supreme Court denied certiorari in *ITT*, and did not vacate as moot. No conclusions may be drawn from the denial of certiorari. *See* Maryland v. Baltimore Radio Show, Inc., 338 U. S. 912 (1950) (Frankfurter, *J.*); H. M. Hart & H. Wechsler, The Federal Courts and the Federal System 61 (1953).

16. The First Circuit, finding that there was not a federal preemption and that a balancing of the effects upon each other of the federal-labor and the joint federal-state welfare policies was required, held that this was a role more properly played by the Congress and affirmed the District Court's denial of relief. In view of our disposition of the case, we need not comment further on the First Circuit's action.

17. Indeed, Judge Coffin stated, after discussing the *Southern Pacific* doctrine, "In any event, however, the appeal of Maurice Concrete [the appeal joined with *ITT*, in which the dispute had continued] presents the identical question." 435 F. 2d at 991.

The fact that a strike was still in existence at the time the appeal was before the First Circuit indicates that evasion of review is not inevitable.

provoke an injunction terminating the work stoppage, without resolving the dispute.[18] The present case would appear to be the obverse of this. Here, the employers can arguably claim that their collective bargaining ability is hindered by the employees' knowledge that a strike might be made more endurable through receipt of welfare benefits.

The Supreme Court, in *Oil Workers*, citing its earlier dismissal of Harris v. Battle, *supra*, squarely rejected both portions of appellants' argument:

> "In Harris v. Battle, 348 U. S. 803, these principles were given concrete application in a context so parallel as explicitly to control disposition of the primary issue here. That case originated as an action to enjoin the enforcement of a Virginia statute, markedly similar to the King-Thompson Act, under which the Governor had ordered that 'possession' be taken of a transit company whose employees were on strike. Although the labor dispute was subsequently settled and the seizure terminated, the trial court nevertheless proceeded to decide the merits of the case, holding that the seizure was constitutional. Harris v. Battle, 32 L. R. R. M. 83. The Virginia Supreme Court refused an appeal. Harris v. Battle, 195 Va. lxxxviii. In this Court it was urged that the controversy was not moot because of the continuing threat of state seizure in future labor disputes. It was argued that the State's abandonment of alleged unconstitutional activity after its objective had been accomplished should not be permitted to forestall decision as to the validity of the statute under which the State had purported to act. It was contended that the situation was akin to cases like Southern Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U. S. 498, 514-516.

18. In *Bus Employees, supra*, the Court stated that the threat of reinvocation of the seizure act in *Oil Workers* was only speculative. This may well be read to indicate that the detrimental effect on collective bargaining because of the "background fears" argument, alone, is not weighty enough to keep alive a controversy.

> In finding that the controversy was moot, the Court necessarily rejected all these contentions. 348 U. S. 803. Upon the authority of that decision the same contentions must be rejected in the present case. See also Barker Co. v. Painters Union, 281 U. S. 462; Commercial Cable Co. v. Burleson, 250 U. S. 360. 361 U. S. at 368-9.[19]"

More recent Supreme Court pronouncements on mootness in labor cases have not significantly undercut the *Oil Workers* rule that settlement of the underlying labor dispute, absent special circumstances, requires a holding of mootness. *See* Sears, Roebuck & Co. v. Carpet Layers, 397 U. S. 655 (1970).

In Liner v. Jafco, Inc., 375 U. S. 301 (1964), a Tennessee state court enjoined picketing at a building site, and required the contractors who had sought the injunction to post a bond to indemnify petitioners if the injunction were "wrongfully" sued out. The Tennessee Court of Appeals, finding that the construction at the site had been completed, dismissed the enjoined picketers' challenge as moot. The U. S. Supreme Court, holding that mootness is a federal question, addressed the issues raised by the petitioners. The Court held that the petitioners, whose federally protected rights might have been abridged, and for whose benefit the bond had been posted, had a substantial continuing stake in the litigation both because their rights had already been abridged and because provision had been made to redress such deprivation if found unlawful. In the case now pending, such considerations are not present. Moreover, state court interference with labor problems arguably within the exclusive jurisdiction of the NLRB is a matter which the Supreme Court held particularly important previously, and therefore felt compelled to adjudicate the case.

---

19. Three Justices dissented in *Oil Workers*. Their dissent, however, was bottomed on the possibility that striking union members might be liable for monetary damages or loss of seniority, a question the majority held not to be properly before the Court. No one expressed any doubts that the resolution of the labor dispute mooted the major issue in the case, the constitutionality of the injunction.

The cases discussed in Part I of this opinion, while perhaps indicating some lessening of the mootness stricture, do not appear to affect the vitality of *Oil Workers* in a labor context. If *Oil Workers* is to be found not harmonious with the current contours of the mootness doctrine, that decision should, and perhaps must, be made by the U. S. Supreme Court.

The *Oil Workers* case requires that we dismiss this appeal. The lack of immediacy and solidity of interest necessary to support jurisdiction is reflected here in the atmosphere of abstraction, ambiguity, and conjecture surrounding this matter. Accordingly, we now dismiss this appeal as moot with directions to the District Court, on remand, to vacate and dismiss for the same reason. See United States v. Munsingwear, 340 U. S. 36 (1950). *Cf.* Socialist Labor Party v. Gilligan, 406 U. S. at 592-3, n. 3 (Douglas, J. dissenting)

This disposition is consonant with a proper appreciation of the role of the federal judiciary when asked to decide the constitutionality of state statutes and programs. In such cases, our task does not involve conjuring up situations to preserve an otherwise quiescent issue, nor does our assignment include constitutional adjudication unless such is necessarily implicated in the decision of a case or controversy squarely before the Court. *See* Ashwander v. TVA, 297 U. S. 288, 346-8 (1936) (Brandeis, J. concurring). Because we act only when required, can we legitimately act at all. The issue presented to the Court is now moot, therefore, we must stay our hand.

An order will be prepared, remanding the case to the District Court for disposition consistent with this opinion.

GIBBONS, *C. J.*, dissenting.

This is an appeal from a dismissal by the district court pursuant to Rule 12(b)(6), Fed. R. Civ. P., for failure to state a claim upon which relief may be granted. The appellants are two New Jersey corporations engaged in the tire sales and service business. According to the complaint, all their production and

service employees are represented by the intervenor defendant, Teamsters Local Union No. 676. On May 14, 1971, upon the expiration of a collective bargaining agreement which had been in effect since May 15, 1968, the local struck as a result of the parties' failure to reach a new agreement. According to the complaint, that strike was still in progress when the complaint was filed on June 10, 1971. The only hearing was that held on June 24, 1971. That hearing was on the plaintiffs' motion for a preliminary injunction, in support of which the plaintiffs were prepared to offer testimony. At the hearing the intervening defendant, Local Union No. 676, was permitted to intervene; the Attorney General, representing the public official defendants, was permitted to make an oral motion to dismiss for lack of jurisdiction under 28 U. S. C. § 1337, upon which the court never ruled. The intervening defendant was permitted to make an oral motion to dismiss for failure to state a claim upon which relief may be granted. In advancing the Rule 12(b)(6) motion, counsel for the local relied upon the opinion of the First Circuit in *ITT Lamp Division* v. *Minter*, 435 F. 2d 989 (1st Cir. 1970), *cert. denied*, 402 U. S. 933 (1971); although, as that opinion makes clear, the district court decision reviewed was the denial of a preliminary injunction after an evidentiary hearing. The district court below declined to take testimony, and dismissed solely upon the basis of the allegations in the complaint. Thus, assuming that the case is still justiciable, our review would be confined to the legal sufficiency of the allegations of the complaint, in particular the allegations in paragraph 14:

> "Plaintiffs believe and therefore aver that the payment by the State of New Jersey through its instrumentalities and political subdivisions, pursuant to the aforesaid interpretative regulation, of public assistance and public welfare benefits to individuals and the families of individuals who voluntarily leave their employment to directly engage in and actively participate in an economic strike against their

employer, interferes with and infringes upon free collective bargaining as guaranteed to Plaintiffs by Congress under the Labor-Management Relations Act of 1947, as amended, 29 U. S. C. § 141 *et seq.*; constitutes an intrusion by the State of New Jersey into the field of labor-management relations which Congress has pre-empted and occupied to the full extent of its powers; and, accordingly, violates Article VI, Clause 2 of the Constitution of the United States."

At the hearing the plaintiffs were prepared to offer testimony in support of their claim that the availability of welfare benefits for strikers did in fact interfere with and infringe upon free collective bargaining. The absence of such proof at the hearing upon the preliminary injunction was relied upon by the *Minter* court as one reason, among others, for affirming the denial of a preliminary injunction in that case. Here, the plaintiffs were prepared to offer such evidence, but the court ruled that the complaint failed to state a cause of action. Reading the complaint as a whole, and particularly paragraph 14, it is perfectly clear that the gravamen of the charge is that the *availability* of strike benefits adds the economic power of the state to the union side, and thereby interferes with the *collective bargaining relationship.*

Thus, this controversy is moot only (1) if welfare benefits to strikers are no longer available, or (2) if there is no longer a collective bargaining relationship which can be affected by such availability. It is clear from the briefs filed on behalf of the public defendants that welfare benefits are still available to strikers in New Jersey, and that the state has no present intention of changing its policy with respect to such payments. Thus, the only basis upon which this controversy may be classified as moot is a finding that there is no longer a collective bargaining relationship which can be affected by the acknowledged continued availability of welfare benefits for strikers.

Since no testimony was taken in the district court, the record is almost totally devoid of any facts with respect to the actual status of the collective bargaining relationship. The judges in the majority act upon the conflicting representations of counsel as to the date of termination of the strike. The opinion states:

> "The union states that the strike 'ended immediately prior to the June 24, 1971 hearing.' The employers allege that the 'employees did not return to work until June 28, 1971.' Under either factual situation, a new contract having been accepted and ratified, it is clear that the labor dispute undergirding this challenge to the New Jersey programs had been concluded before the trial judge dismissed the action and long before appeals were filed or argued in this Court." (footnote omitted)

With deference, it is a long logical leap from the very little information furnished to us upon which counsel agree, and the conclusion drawn by the majority. Among the unanswered questions are these:

A. There is a contract, but is it of long or short duration?

B. If it is of short duration, will collective bargaining over terms of its renewal, extension or modification continue while it is in effect?

C. Whether it is of long or of short duration, does it have a binding grievance/arbitration and no-strike provision, or is the union free to strike over grievances?

D. Will the availability of welfare benefits to strikers have any effect upon the bargaining relationship in any of the above situations?

The plaintiffs vigorously assert that the bargaining relationship is still affected by the availability of strike benefits. If the record established that the parties were in year one of a three-year labor contract with a no-strike clause, I would agree that the controversy might be too speculative to warrant decision. Short

of that situation, the impact on the collective bargaining relationship of the availability of welfare benefits to strikers may be quite real and immediate. But we simply do not know what the situation is because the plaintiffs were deprived of the opportunity of making a record in the district court. The analytical unsoundness of the majority's position is reflected in its reliance, in support of its mootness conclusion, on that very deprivation. The opinion states:

> "The lack of immediacy and solidity of interest necessary to support jurisdiction here is reflected in the atmosphere of abstraction, ambiguity, and conjecture surrounding this matter."

If there is abstraction and ambiguity it arises from the absence of a record. If there is conjecture, the conjecture is by the majority of this panel. Their conclusion that there is no collective bargaining relationship which may be affected by the availability of welfare benefits to strikers is entirely conjectural. Appellate decision making cannot be reduced to scholastic disputation about rules to be drawn from previously decided cases. It must first of all be grounded in facts. There is no more justification for making a hypothetical or conjectural decision upon an issue of alleged mootness than upon an issue going to the merits.

This case can be regarded as having been made moot by the termination of the strike only if we construe the complaint as addressed to the protection of the integrity of the collective bargaining relationship only during the pendency of a strike. But it cannot fairly be so construed. Collective bargaining over contract terms more often than not goes on for months before a strike. Collective bargaining over grievances may go on continuously. The complaint seeks to unfetter the collective bargaining relationship from alleged interference by New Jersey. The relationship for which the protection of the court has been sought is a continuing one. *See NLRB* v. *Newark Morning Ledger*, 120 F. 2d 262, 267 (3d Cir.), *cert. denied*, 314 U. S. 693 (1941).

In the contect of the protection of a continuing relationship perhaps only two of the many decisions discussed in the majority opinion are relevant, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 (1946); *Bus Employees* v. *Missouri*, 374 U. S. 74 (1963).

In *Fishgold* a veteran was laid off by his employer in compliance with the seniority provisions of a collective bargaining agreement. He sued the employer for damages and for a declaratory judgment that his layoff was in violation of Section 8(c) of the Selective Training and Service Act of 1940, 50 U. S. C. App. § 301. The labor union intervened, taking a position in defense of the validity of contract seniority provisions. The district court awarded money damages to the veteran, and only the union appealed. Meanwhile, the one-year statutory veteran's preference period for the original veteran plaintiff's employment had expired. The Supreme Court held that the union, because of the ongoing relationship between it and the employer by virtue of the labor contract, had standing to appeal. Since the contract was still in existence, the case was not moot. *Fishgold* is, of course, only authority for the instant case by way of analogy. But the analogy is closer than in any of the cases upon which the judges in the majority rely.

Bus Employees, as the majority opinion points out, dealt with the validity of a Missouri statute which gave the governor of that state the authority to seize the facilities of a public utility in the event of a strike, and to operate them in the public interest. The statute was challenged on the same basis as is the New Jersey regulation on welfare benefits to strikers challenged here, interference with a relationship regulation of which has been preempted by paramount federal law. While the case was on appeal the governor terminated the seizure. Missouri then urged mootness, relying on *Oil Workers Union* v. *Missouri*, 361 U. S. 363 (1960), a case involving the identical statute. The court declined to dismiss as moot, and held the Missouri statute unconstitutional. It distinguished *Oil Workers* because in that case

both the labor dispute and the seizure had ended, whereas in *Bus Employees* the strike had not ended and the availability of the seizure device as an available means of terminating it had an ongoing effect. *Bus Employees*, again, is only analogous authority since the plaintiffs sought the protection of the right to strike, a right lawful under the National Labor Relations Act which Missouri attempted to make unlawful. But on the mootness issue the case is quite closely in point, for it recognizes that the availability of state interference can have an ongoing effect upon the collective bargaining relationship, and that a controversy over such availability is not moot, as long as the affected relationship exists.

The issues in this case are of considerable public interest, and likely to recur. Overanxiety on the part of the federal courts to find such cases non-justiciable is not consistent with our judicial obligations. As Judge Coffin said in a similar context:

> "Although the strike against ITT was subsequently settled, the issue, we know from our own experience, has earlier vainly sought appellate review in this circuit, and is likely again to be raised, bringing it close to the 'recurring question' category, where significant public rights are involved and court review ought not, if possible, be avoided. *See* So. Pac. Terminal Co. v. I. C. C., 219 U. S. 498, 515-516, 31 S. Ct. 279, 55 L. Ed. 310 (1911) and Marchand v. Director, U. S. Probation Office, 421 F. 2d 331 (1st Cir. 1970)." *ITT Lamp Division* v. *Minter, supra*, at 991.

We cannot without a record properly hold that this case is moot. At the same time, since there is no record, we cannot rule out the possibility that the situation of the parties has so changed as to render the case moot. The issues involved are complex and their proper resolution far from clear. *Compare ITT Lamp Division* v. *Minter, supra, with John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance*, 349 Mass. 390, 208 N. E. 2d 516 (1965). I would remand the case to the district

court for a hearing to determine first, the actual collective bargaining relationship between the parties, and next, in what way, factually, that actual relationship is affected, if at all, by the availability of welfare benefits to strikers. Only with such a record can we properly decide if there is still a genuine case or controversy, and, if so, how it should be resolved.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Super Tire Engineering Company; Supercap Corporation; and A. Robert Schaevitz

vs.

Lloyd W. McCorkle, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; Irving J. Engelman, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; Fred L. Streng, Director of the Camden County, New Jersey Welfare Board; and Juanita E. Dicks; Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey. Intervenor: Local 676, Teamster Union, etc.

Super Tire Engineering Company,
Appellant in No. 71-1773,

Supercap Corporation,
Appellant in No. 71-1774,

A. Robert Schaevitz,
Appellant in No. 71-1775.

(D. C. Civil Action No. 853-71)

On Appeals from the United States District Court for the District of New Jersey.

Nos. 7-1773/71-1775.

Present: MCLAUGHLIN, ADAMS and GIBBONS, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the appeals in these cases be, and the same are hereby dismissed as moot, and the cause remanded to the said District Court with directions to vacate its judgment, filed July 13, 1971, and to dismiss for the same reason, all in accordance with the opinion of this Court. Costs taxed against appellants.

ATTEST:

THOMAS F. QUINN,

Clerk.

November 22, 1972.

United States Court of Appeals
For the Third Circuit.

Super Tire Engineering Company, et al.,
Appellants,
vs.
Lloyd W. McCorkle, et al.,
Appellees.

Nos. 71-1773, 774 and 775.

Present: McLAUGHLIN, ADAMS and GIBBONS, *Circuit Judges.*

ORDER.

Amicus status in this appeal is hereby granted to the United States Chamber of Commerce.

The affidavit of Professor Northrup will be received and filed with the record.

By THE COURT,

Arlin M. Adams,
Circuit Judge.

Dated: November 22, 1972.

State of Pennsylvania
County of Philadelphia } ss.

AFFIDAVIT

HERBERT R. NORTHRUP, being duly sworn, deposes and says:

1. I am the same Herbert R. Northrup whose affidavit was submitted by the Chamber of Commerce of the United States to the United States District Court, for the District of Maryland, in *Francis* v. *Davidson*, No. 71-753K.

2. The aforesaid affidavit was prepared on the basis, in part, of the testimony that I would have given if permitted to testify in the United States District Court, for the District of New Jersey, in *Super Tire Engineering Company* v. *McCorkle*, No. 853-71. I had been requested by Mr. Herbert Keene, counsel for plaintiff in that case, to testify at the hearing thereon on June 24, 1971. Such testimony was not, however, permitted by the Court.

3. If I had been permitted to testify by the Court in *Super Tire*, my testimony would have been substantially similar to that contained in my affidavit filed in *Francis* v. *Davidson*.

Further affiant saith not.

Herbert R. Northrup
Herbert R. Northrup

Subscribed and sworn to before me this 24 day of September, 1971.

Sidney L. Fisher
Notary Public

Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires July 5, 1973.

IN THE UNITED STATES DISTRICT COURT
For the District of Maryland

Civil Action No. 71-853k

FRANKLIN WILKINS, et al., and ROBERT FRANCIS, et al.,
Plaintiffs,

vs.

RITA C. DAVIDSON and RALEIGH C. HOBSON,
Defendants.

Affidavit of Doctor Herbert R. Northrup in support of Memorandum of the Chamber of Commerce of the United States as Amicus Curiae, in the State of Pennsylvania, City of Philadelphia, County of Philadelphia.

DR. HERBERT R. NORTHRUP, having been duly sworn, was examined and testified as follows:

2 Mr. Cohen: My name is Lawrence M. Cohen, C-o-h-e-n. I am one of the attorneys, along with Mr. Gerard C. Smetana who is also here today, for the Chamber of Commerce of the United States which is appearing as amicus curiae in this case. I have also present today with me Mr. Andrew M. Kramer, K-r-a-m-e-r, who is counsel to ITT in the case of ITT versus Minter which is currently pending in the United States Supreme Court as number 1467.

Doctor Northrup has handed me a resume which I would like to attach to this affidavit and have the reporter mark it as Exhibit A.

By Mr. Cohen:

Q. Dr. Northrup, apart from the general qualifications that are set forth in the resume which you have handed me, can you tell us what your background is in the area of labor relations, generally. How many years have you been engaged in this area?

A. I have been active as a teacher, researcher and practitioner in the field of labor relations and collective bargaining since about 1940. I've specialized in three particular areas within this field. Collective bargaining, compensation, and civil rights in industry or industrial race relations. I've both practiced and taught in all of these areas.

For example, my current research involves the study of Negro employment in some thirty industries under a grant provided by the Ford Foundation. In addition, we have published numerous studies of collective bargaining in industry. Under my direction, studies of coalition bargaining have been published, studies of bargaining in the supermarket industry, studies of bargaining in other industries.

I've personally written numerous articles and books in this area. Generally two or three major articles a year and one book, every year or so. In the overall area, I am the coauthor of the "Economics of Labor Relations" which is the most widely used textbook in the field, and we are currently beginning work on the seventh edition. The first edition was published in 1950. It has been adopted by over three hundred colleges and universities.

I'm also coauthor of "Government and Labor" which is a book in a more specialized field.

There are numerous studies of which I'm an author and coauthor, so that I have been following closely the development in the collective bargaining field for all of my adult life, and naturally interested in anything which impinges or which may affect collective bargaining such as the current wage-price freeze, or welfare payments to strikers, or anything of that nature.

Q. Doctor, you mentioned welfare payment to strikers. Have you engaged in any specific studies or paid any particular attention to that area? A. Under my direction, yes. We have been engaged in an intensive study of this area since the latter part of 1970 and developed interest in it with the idea of determining whether we should make this study at least six months before that date.

Q. Will you tell us what you have done, as far as the study and what methods you've used? A. Well, I'm generally familiar with the area of Social Security and welfare because we have three chapters on that subject in the textbook, but this is a somewhat specialized area, so we start off by bringing—I start off in fact by bringing myself up to date in the area. Reading, getting information on the currencies of the programs and then when it became apparent to me that this would be an area of growing significance, I put together a research team which has been making intensive field studies of this subject on the one hand, and has been also expanding our knowledge, background information, general character of the programs on the other.

Q. Have you had assistance personnelwise? A. Yes. I have three people working with me on this study. One is a former student of mine, now a member of the faculty of the University of Maryland, Professor Armand J. Thiebolt, Jr. A graduate assistant, Mr. Ronald Cowin who is a former student at the University of Oregon where he graduated and who returned to college at the Wharton School after serving in the United States Marine Corps, where he reached the rank of captain. A second graduate student, Mr. Michael Johns who is an expert in statistical methods and data processing and who serves us by handling the statistics for us.

Q. What has been the scope of your study thus far? A. Well, we have attempted to, first, study the overall situation, and then to study individual situations, where welfare has been thought to be a significant factor in strikes and where data are available pertaining to that.

Q. How many such strikes have you studied specifically? A. In the national area, we have looked at the nonferrous, or copper strike which occurred in 1967, '68. The General 6 Electric Strike which was also a nationwide strike, in the sense it involved about a hundred locations of the company, in 1969, I believe, and extended into 1970, and the 1970 strike of General Motors. And then a number of local strikes such as the long strike which occurred earlier this year and late last year at the Westinghouse Lester Plant, which is a suburb of Philadelphia, the 1970 strike of the Oknite Company in California, the strike at Kimberly-Clark which occurred at various locations in Michigan and Wisconsin, and in Niagara Falls, New York in 1970 and '71, a long strike in 1970, '71 at Johns Mansville in New Jersey, and the 1971 strikes at Strick Trailer and Leeds and Northrup, both in the suburbs of Philadelphia. In addition to this, Mr. Cowin is at the west coast examining information about strikes which have occurred in California, Washington and Oregon. He should have completed that shortly.

We also are planning, or have done field work in other strikes and determining whether data can be obtained which will allow us to make some determination about them.

Q. You said that in part of your studies, you engage in field work. Did you, or members of your study group visit states 7 other than Pennsylvania? A. Yes. Mr. Cowin is currently in the west coast. He has visited about ten states, I believe, in total, to determine, to look at information and determine whether we can obtain information about them.

Q. As part of the field efforts as well as your own efforts, have you had occasion to talk to union representatives or welfare department representatives? A. Oh, yes. We interview all parties to the dispute and seek information, and a point of view, where it may be found. Our purpose is to provide information. This is a university research unit and we attempt to get all the information and clearly separate the fact from opinion.

Q. Would that also include reading literature available in the field? A. Oh, yes. Dr. Thiebolt is developing and summarizing the available published information and handling that end of it right now.

Q. Is the study you are talking about conducted under your direction and supervision? A. It's all been conducted under my direction and supervision. I have the responsibility for the final product.

Q. When can you estimate that the final product will
8 be completed? A. We expect the study to be completed by November and to be published in January. This requires, of course, the cooperation of everyone.

Q. Dr. Northrup, based upon your preliminary findings, and as a result of the research you have conducted in your studies, does the study seem to point in one direction? A. Oh, yes. The information that we have now seems to point in a particular direction. There does not seem to be any discrepancies of results, and I would say that when Mr. Cowin returns from California, which is next week, we would feel, that unless he has discovered some new information, that further field work will probably not be necessary because the information all seems to point to the same direction.

Q. Based upon information that you have collected thus far, and as well as your own opinions in this area, do you feel that welfare payments to strikers are a significant cost item? A. I know they are a significant cost item, and I think that they will become an increasing one unless we become a strikless society, which I doubt very much.

Naturally, the amount of payment of welfare is re-
9 lated to the number of manhours lost by strikers. But, let me put it this way:

I feel that an increasing proportion of strikers will be receiving welfare payments in the future, so that even if the number of strikes go down, it's quite possible for welfare payments to strikers to go up.

Q. To what do you attribute this trend? A. I attribute it to two fundamental factors. Number one is an overall change in attitude that many observers, including myself, have discerned concerning receipt of welfare payment. There is a decreased inhibition of the part of people to receive welfare payments, a greater propensity to accept them as a right rather than to regard the acceptance as degrading. Now, this can be ascertained simply by examining the welfare data.

For example, I have here the book by Gilbert Y. Steiner entitled, "The State of Welfare," and published by Brooking Institute, which is a very prestigeous organization in Washington, in 1971. Dr. Steiner is considered an authority on welfare, having written in the field considerably. But the data are government data, which are found on page thirty-two, table one and they show that the average number of welfare recipients was 4.1 million in 1964 and by the middle of 1970, 7.9 million as to payments to welfare recipients, it was 1.5 million in 1964 and 1969—excuse me. That's 1.5 billion in 1964 and in 1969, the last time for which data are present in this case volume if reached 3.5 billion.

Now, this occurred at the time this country was going through its greatest prosperity in history and a prosperous period that lasted longer than any other previous—as we say in economics, any previous height of the business cycle. So, you have the general factor.

Let's say, now, the specific factor that is going to make welfare payments to strikers be received by a greater proportion of the strikers is the efforts of AFL-CIO Community Relation Department and similar departments which are found in other unions such as the Teamsters, or Auto Workers. This department was established right after World War Two by Leo Perlis, P-e-r-l-i-s, a very able and effective individual who established it in what was then the CIO. And it was carried over into the AFL-CIO when the federation merged. Perlis built up an organization to increase the relationship of organized labor and social

work and welfare, and he placed in all community funds, United Funds, community welfare organizations as labor representative to help contribute to these funds, and perform all sorts of available work for the community. At the same time, it was aimed to develop the ability of strikers to get welfare which was undoubtedly the prime consideration of this work.

11

Perlis has been working at this for twenty-five years, and today there is a union representative on all these community boards. Gradually, the local unions and national unions have learned when a strike comes up, or is threatened and negotiations seem to be breaking down, this individual, this union community welfare representative is contacted and he acts as a go-between to arrange to have the welfare people get ready to provide benefits to the strikers. Thus, a sophisticated relationship develops, forms are printed out and handed to union representatives. Union representatives are sworn in as temporary members of the welfare department. Welfare offices are temporarily set up in union halls and the machinery becomes, as we say, well-oiled and better oiled all the time.

Now, another factor which is part of this is the Food Stamp Program. One of my students remarked that the food stamp is a marijuana to the welfare heroin. What happens is, food stamps are Federal programs and Congress has specifically declined to prevent strikers from receiving food stamps. I'm not a lawyer, but it would appear there is no legal restraint at all. As soon as the man goes on strike he is immediately eligible for food stamps. He gets those through the welfare department and the union helps him on. As he goes into the welfare department, the social worker is likely to say to him "Now, we have other things that might be helpful to you . . ." They act like a clerk in a supermarket . . . "and you are eligible for this program, that program and another program . . ."

12

Food stamps in effect, get him on welfare and break down his inhibition again from taking welfare and these other programs,

which involve greater cost to the taxpaying public, are introduced to him, and efforts are made obviously by the people through the union representatives or social workers to show him how he may be qualified to programs he never heard or wouldn't otherwise be involved in.

So, this is going more and more, becoming more and
13 more common. Specially resulting from the tremendous publicity it receives such as the big strikes, the General Electric one in '69, '70, the General Motors one in late '70, the Chicago Teamsters' strike. Things like that.

Q. Dr. Northrup, you have talked about the willingness or lack of willingness to receive welfare. What about the general strike trend in the United States; has that increased? A. The general strike trend has been up in the latter part of the '60s. The strike trends are frequently higher in inflationary periods. I don't think anyone is prepared to say, at this time, that this is a permanent factor. It may be a significant factor, of course, I don't know what the effect of the wage-price freeze will be on strikes. They will, for a while, inhibit strikes. If the freeze lasts longer, there may be an explosion. This occurred in European democratic countries, but I would say that the strike trends—

Q. You say explosion. What do you mean by that? A. I mean tremendous breaking out of strikes all over. This could occur as a result of the wage-price freeze. So, when one talks about a trend, one has to be careful, to think on longer terms than five or six years, and in the last five or six years, definitely been up.

14 Q. Dr. Northrup, in your earlier question, you were talking about the AFL-CIO campaign strikes to inform strikers about welfare; at what stage does that usually occur? A. Well, it usually occurs in the strike preparation stage. It becomes more sophisticated now. In some cases, the unions have, in the past, waited until they got into a strike. Now it's more likely to occur in the strike preparation stage. Let me give you an example of how this occurs:

I have, here, a clipping from the "Chicago Sun Times" of August first, 1971. Now, you will recall about that time there was a question of whether there would be a nation-wide steel strike and this article has a remarkable title of quote: "Little Impact Seen in Ninety-day Steel Strike" end quote. It deals with various trends, various situations and I think they are talking about local sixty-five, a very large United States Steel facility in south Chicago, which is Indiana—excuse me. It's Gary, Indiana. It's South Works in Gary, Indiana.

Well, now, it says that, ". . . The union had four hundred trained counsellors . . ." and its says, and I quote: "Indiana welfare staffers have been training steel workers as tem-
15 porary welfare clerks for months."

And it says, quote: "Steel workers contribute mightily to the United Fund . . ." This is a quotation from the union officials. "So in a strike situation we feel we can appeal to those agencies just as they appealed to us."

And then it says, "The committees would also try to enroll as many steel workers as could qualify on public assistance rolls . . ." It quotes—

Q. Dr. Northrup, may we introduce that as Exhibit B? If you will, Miss Reporter.

Let me just ask you this that whether in your opinion the experiences related in that article are typical or atypical of the average strike situation? A. Typical of the large union strike today. They are, I would say they are and it's becoming more and more common.

Q. To what extent do local welfare agencies investigate an applicant's need prior to giving him assistance? A. You mean strikers?

Q. Yes, strikers. A. Virtually not at all. There are several reasons for this. Number one, when a strike occurs,
16 you have a virtual mob scene. Now, at the welfare office and even though the welfare department has put on tre-

mendous numbers of new temporary staffers at a very large cost to the tax payer for administration, they have no time. They come in and all these people demand welfare and pay. At other times, such as was indicated by that article, they put union people on as temporary staffers and simply just processed them as a means of signing them up.

So, in answer to your question, I would say investigations are conspicuously absent.

Q. Are work requirements, work rule requirements any form of hindrance to the striker? A. None at all.

Q. Why is that, sir? A. In a most unusual way. They regard strikers as out of work and incapable of getting work. They take the position that most companies won't hire strikers which often is true. Therefore, strikers have a need and therefore, they could get welfare. It's a very simple logistical situation.

Q. Dr. Northrup, you talk about welfare generally. Could we cover what forms, what particular form welfare would take? A. Welfare can take many forms. This first, of course, I might say is the National Food Stamp Program which is, as I pointed out earlier, is completely available to strikers. All the costs are paid by the Federal government and it enables strikers to get, say in various areas, depending on various things, as an example, about $120 worth of food stamps for maybe $20, something like that.

It's a significant factor. Strikers can go into a supermarket, buy a $100 worth of food and pay less than one fifth of what it's worth. Then there is Aid to Dependent Children, the Unemployed Father Segment. These programs provide cash payment to cover such costs as food, clothing, personal and household incidentals, heating, light, refrigeration, even rents or mortgages.

For example, during the General Electric strike of 1969 and '70, in Onondaga County which is where Syracuse is, GE has a big facility there, the New York Welfare department paid

mortgage payments on at least twenty strikers' homes. In addition to other aids, they also gave allowances for medical and dental care.

Q. Is this the medicard programs, if you know? A. Yes. General assistance programs that states support are another factor. These are programs available to individuals and
18 married couples without children, or in some cases married couples for children who are not eligible for the ADC-U program.

Q. The Unemployed Father Segment— A. Yes. Mainly this program is a direct relief program. States like to get people out of the direct relief program onto some form of Aid to Dependent Children, because Aid to Dependent Children is picked up largely by the Federal government, and General Assistance comes out of the state's pocketbook. Strikers are often started on direct relief or that type of aid and then shunted off to the ADC program as soon as possible.

There is also emergency assistance which is designed to provide immediate aid, which comes from the state or county funds, sort of like a petty cash fund. It gives immediate cash assistance until they can get them on another program.

For example, in Delaware County, Pennsylvania, where the Westinghouse plant is located, the Delaware County Board of Assistance was forced to borrow against future funds because it budgets $150,000 per half year, and uses that up quickly in the strike.

Q. Dr. Northrup, would that program be available,
19 for example, before a waiting period? A. Oh, yes. No waiting period was required, although Westinghouse employees were well paid, up toward $4 per hour. They were paid some of these from the direct emergency relief.

Now, in addition you have monies to assist those veterans who are unemployed. For example, Michigan's veterans trust was used to help General Motors strikers. Lynn County, Massa-

chusetts, where again, General Electric has a major facility, between twelve and thirteen thousand dollars was paid to strikers who were veterans during General Electric's strike.

Then, you have the so-called WIN program, except this program is designed to get employables out of relief and give them training so that they will be able to take care of themselves.

On the face of it, see, a striker just doesn't belong. He's an employed person, he's not unemployable. He's trained or he wouldn't be working. But they go report for training and the Department of Labor takes care of them by paying them a stipend. Of course, the thing is, like money blowing away. As soon as the strike is over, they are likely to go back to their own jobs.

20 Then, there is the employment insurance benefits which provides benefits to strikers, after seven weeks in Rhode Island and New York, where they get half former pay up to about $75 a week in New York.

Surplus foods is another payment that isn't so common now. It's been largely replaced by the food stamp program.

Q. You mentioned the stipend that the people receive on the WIN program; is that actually training they are going through? A. They are supposed to take actual training at that time, and of course, they usually drop out immediately when the strike is over. But, there is very little potential to get training for the particular job which they have. So, the training is usually wasted or the striker uses it, maybe, in the pursuit of hobbies or something like that. You see, it's a clear perversion of a program purpose.

Let me add to it on the WIN program. In the General Motors strike, almost twenty thousand people applied for training. The Department of Labor had no facility or capacity to take care of them, and so it compromised largely by paying them
21 a stipend of about, I think, $30 a week and put them in a holding status. They would get training theoretically,

when training became available. But of course, they just went back to work.

Q. Dr. Northrup, you just explained the various types of welfare and assistance that strikers get. Does the availability of these programs vary from state to state? A. Yes, it does. I trust you mean the availability to strikers.

Q. Yes. A. The availability not only varies from state to state, but in some states from county to county. Some fifteen or more states do not pay welfare to strikers. That is, such welfare that is under their administrative control. They can be right next to a state that pays, and the same strike can thus result in this type of disparity.

For example, welfare is paid to strikers in Illinois. It is not in Iowa. You can have a strike at John Deere, or at International Harvester and the strikers in one of the states would get welfare and in the other they would not. In the county area, things like direct assistance, general welfare can depend a great deal upon the predilection of the administration. That is because some are lenient about giving to strikers and some are likely to be less inclined to spend their taxpayers funds in this manner.

Q. Can you give us same example, Dr. Northrup, of the amount that has been paid out to various strikers from welfare funds that you have studied? A. Well, in the 1969-70 General Electric strike, for example, there were somewhere in the neighborhood of one hundred twenty-five thousand to one hundred fifty thousand strikers. The principal union was the International Union of Electrical and Radio Machine Workers. It paid benefits $12 to $14 per week. The second largest union, the United Electrical Radio and Machine Workers paid no strike benefits.

During a December, 1969, labor news conference an AFL-CIO representative disclosed strikers were receiving about $50 per week in public aid. In January of 1970, it was estimated that about one fourth of the strikers were receiving food stamps or surplus foods. Food stamps were just getting underway. The

surplus food program was more significant at that time than it is now.

So, in New York, twenty-five thousand union strikers were receiving an average of $50 per week compared to the $12 or $14 provided by the union. And, when you add strike
23 benefits and unemployment compensation, you could go up to $333 per month in New York.

In Massachusetts, General Electric strikers received welfare payments of two million thirty-seven thousand eight hundred twenty-three dollars during the strike. About one thousand strikers, for example, in Pittsfield, Massachusetts, received about $40 a week in public assistance.

According to the Director of Massachusetts' Department of Welfare, in Lynn, one thousand seven hundred sixty-one strikers were receiving an average of $47.14 per week in welfare assistance, which is more than twice as much as they got in strike benefits.

In Danville, Illinois, they were averaging $247 a month. And Evendale, Ohio, which is outside of Cincinnati, $275 a month.

In Bridgeport, Connecticut, $33 a week.

So, in that particular strike, they not only received a vast amount of public funds, but they got more than twice as much from the public treasury than they did from the union treasury.

In the General Motors strike in 1970, eighty-three million in cash payments from welfare assistance was provided
24 in Michigan alone. Another fourteen million in food stamps. In addition, strikers got from the UAW, the union, $30 a week for a single person, $35 a week for a childless couple, $40 a week, for a family. From public assistance, they got an average of $100 a month. They got about $94 in food stamps a month.

So, we got about a total of $172 a month in strike benefits, and $188 in welfare benefits. $182 to $195 it varied from month to month.

In California, the welfare department determined that a family of four would require about $350 a month to meet its needs. After $172 strike benefits is deducted, the family would get $178 from ADC-U program and between $60 and $90 per month in food stamps.

Now, out there General Motors, where it has a number of plants, a good many strikers with four dependents received in excess of $238 per month if on welfare, plus strike benefits of $172 per month which would give him about $95 per week while he was on strike, a substantial amount of money.

In the Westinghouse strike, which lasted one hundred fifty days in 1970 to '71, in Lester, Delaware County, outside of Philadelphia, the union didn't pay any strike benefits
25 but a family of four on welfare got $300 a month public assistance, and $40 in bonus food stamps. Two thousand five hundred employees were receiving food stamps.

At Johns Mansville, in Mansville, New Jersey, central New Jersey, the strike lasted from 1970 to '71, five and a half months. The union, the United Papermakers and Paperworkers, paid about $40 a week in strike benefits. Employees got $300 a month in welfare, plus food stamps.

Q. What is the number of strikers, percentagewise, that generally receive welfare benefits? A. It varies according to the capacity of the union to generate the administrative and other factors which bring them into the welfare situation. But, it goes anywhere from ten to forty percent, and it's definitely tending, as strikes get well publicized and the machinery gets more efficient to increase the number, I would suspect that the way we are going, that in another two years, you'll find sixty to eighty percent of strikers will receive welfare.

Q. These examples that you have given, Dr. Northrup, is that a typical example, you would feel, or an atypical example? A. No. I feel it is typical and particularly
26 typical of the future. We have found, for example, that a great many building constructions and trucking em-

ployees have received welfare benefits within that period. The telephone employees in their recent strike received welfare benefits. It's much more difficult to study these because these are widely scattered and make up only a small part of one particular community. So, that our data, our research, concentrates on these situations where the employees make up a substantial part of a community, or an area or a state labor force or where it is a major enough strike so that the impact is easier to determine statistically because, as I say, I remarked before, the data provided by the welfare people are insufficient to provide answers without doing extensive field work.

Q. What has been the source of the figures that you have given us? A. The sources are, number one, the local statistics kept in the local welfare department, those kept in the State of Michigan, where the State of Michigan keeps much better data than other states. Also, in California, hearing on this issue generated data. In addition, we have interviewed unions, companies and welfare people. In all of the situations, where we have investigated the strikes and obtained as much information as possible from them. We also do various statistical analyses.

For example, I would like to show you, and you might be interested in a typical statistical run that we have done which examines the extent of welfare in two previous years in Delaware County, Pennsylvania. In one year, in which there was no strike, and the following year in which Westinghouse has a very major facility, was on strike.

Q. These documents, Dr. Northrup, I'm going to have the reporter mark them as exhibits. May we have these documents marked as exhibits? A. Yes.

Q. These two documents have been marked as Exhibits C and D. A. Right.

Now, you will note that the document marked as Exhibit C, shows the trend of welfare from July of '69, to March of '70. And then, July of 1970 to March of '71. Now, the

economic situation in Delaware County was somewhat depressed, particularly because a major company—Boeing—laid off a great number of workers. So, in one pattern, welfare seems to be somewhat higher than the second year.
28 But, you will note it rose dramatically in August and stayed up, reaching a peak in January and then subsided slightly in March. That was the period of the Westinghouse strike. Therefore, we would say that the bulk of that general assistance plan was suddenly going up so high was because of the Westinghouse strike.

Now, I also call your attention to the slight drop in January. There, you see? And, that's when the transfer of the general assistance people went to ADC until the strike ended.

Q. You are now looking at the document that has been identified as Exhibit C? A. That's right. You see, that's a very serious problem. You can take that a little far and explain it further, you will find that generally—

Q. You are now looking at Exhibit D? A. Yes. The trend is somewhat different between ADC Aid to Dependent Children, Unemployed Parent segment and the general assistance. The reason they don't follow together is that the state or county people tried to transfer people from one to the other. This tremendous increase represents, without any question of a doubt, the impact of Westinghouse strike on the com-
29 munity which pays welfare to strikers.

Q. This strike, as you have mentioned previously, Dr. Northrup, is a strike you have studied as part of your general study of the area? A. Oh, yes.

I also call your attention to a second chart.

MR. COHEN: Would you have that marked, Miss Reporter, as Exhibit E?

THE WITNESS: This chart based on the statistics from the Department of Social Services in Michigan shows that the number of people who were on food stamps during the General

Motors strike shows, and divides them into two groups of people. Persons in public assistance households and persons in nonpublic assistance households.

Note the tremendous increase in non-public assistance households' initial impact of paying food stamps to strikers, and this tremendous increase in food stamps is a direct result of the General Motors strike.

In addition, you will note that the persons on public assistance households increased substantially and did not decline
30 as fast when the strike ended. This is because some remained on assistance and also some of the impact of the strike in forcing people to go on assistance.

By MR. COHEN:

Q. Dr. Northrup, you mentioned some examples of how the amounts paid under public assistance, and what unions and private agencies provided to strikers, compared to the employees' net pay prior to a strike. Could you give us a general comparison in that area? A. I would say that the amount the union provides is usually in the range of a maximum of a half. Let me correct that. In the beginning, the union sometimes can pay almost as much as public assistance, but drops off more rapidly so the overall average, what the union pays if the strike lasts about a month, would be about one half at the most.

Now, the longer the strike lasts, the less able the union is to pay benefits.

Q. Why is that so? A. Well, the costs of, if you have a strike involving ten thousand employees, to pay them, let's say $30 a week, is a substantial amount. And, even organizations like the United Automobile Workers which had a net
31 worth of many millions of dollars, in fact, checking with my textbook, I think I have a figure of—if I might find it. Well, the automobile workers, for example, in 1967, took in almost fifty-eight million dollars in receipts from dues and the like. But, the net worth, I would say of well over two

hundred million easily was used up. That money was used in strike benefits and payment of medical costs which it had to during the strike. So the union came out of the strike with General Motors totally broke, having had to mortgage its buildings and borrow money and so forth.

What the unions are using are the welfare rolls. The welfare funds and other tax supported money are used to pay extended, indefinite strike benefits. To extend benefits indefinitely to a large number of people.

Q. Is there any evidence that you have seen, that the unions would prefer strikers to receive assistance because of the aid provided from public moneys? A. I don't know if I can answer the word in terms of desires, but the inflation of the last several years has hit the union operation rather hard. In many cases, it's combined with a drop-off in the number employed and therefore members. And, there is an increasing tendency, I would say, of union members to resist dues increases,
32 and under the Landrum-Griffin Act, such increases have to be approved by the membership. Let me make a final point. A union official doesn't make himself popular by asking for dues increases. That is a human characteristic. The membership wants to get as much as it can for its money so the public funds amount to a way out—they're very happy from the union's point of view, they don't have to ask for increase in dues. They don't have to alienate membership. They don't have to, maybe, cut their services in order to provide a larger strike fund.

They can just direct their members to the public treasury.

Q. Do you see any correlative benefits to management? A. I really can't see what it means to management. The union is in a position to encourage its members to hold out longer and demand more money, higher settlements. For management, it would be extremely difficult indeed to find any benefits to accrue from such an arrangement.

Q. Is there any similar fund available to employers that have to suffer hardships from strikes, that you know of? A. The only mitigating fact to an employer is, of course, he
33 makes less money. He pays less taxes. But, he ends up with a net loss. So, I fail to see that is an advantage.

Q. Now, does the amount of public—let's say assistance provided to strikers, how does it compare to their net pay prior to the strike? A. Again, the average here wouldn't mean much because of the various situations.

Q. Can you give us an example? A. In the DuPont strike, involving the DuPont Company and an independent union in Niagara Falls last year, we made some calculations and tried to figure the effect of the strike, including the income tax that the employees were paid, New York having a rather severe state income tax as well as Federal tax. The employees were making $185 a week on the average before the strike. During the strike they were getting food stamps and unemployment compensation. I figured that, for about $35 to $45 less per week, they could enjoy not working.

In other words, by not working and receiving these nontaxable benefits, including—excuse me. Not including that nontaxable benefits, they were suffering a net loss of only $35 to $40 a week.

Now, such—I told you about the case of that typo-
34 graphical union where they were breaking even in New York—

Q. I don't think you covered that. Would you please tell us? A. Well, you recall a number of very severe strikes against the newspapers in New York City in the last decade, and one involving the typographical union. It was paying strike benefits and employees were receiving unemployment compensation so that their net take-home was almost equal. Now, that is an unusual case. When it comes to welfare and food stamps, it can get the gross up to a point of more than half. Anywhere from thirty percent to seventy percent would be my guess.

Where the welfare is paid in one of the states like New York and California, which has quite a generous welfare payment, I think—

Q. Dr. Northrup, what is the effect that welfare payments to strikers have on the administration of state welfare programs? A. Well, welfare costs a lot to administer, rightly or wrongly. And, the administrative costs are really quite tremendous and when you have a surge of people going on welfare, even if they just process the thing without investigating it, the cost can mount very severely.

35 In any state like Michigan, that is affected by strike, like the one that occurred at General Motors, you have a sharp reduction in income for the state because a lot of people are out of work, and sharp increases in expenses result from the payment of welfare and the administrative cost involved therein; even in food stamps, the state has an administrative cost. You have a situation where the state has to take money from other services to provide that—for example, in Michigan, they reduced the funds to education in order to pay welfare to strikers. That is the net effect.

In economy we have a fundamental law called the doctrine of opportunity cost. It states that the real cost is something that you give up to get. No state has, nor is it true about the Federal government, that we have unlimited funds for everything. If we learned anything during the 1960's we should have learned that what we have here substantially is the fact that if we pay welfare to strikers, we have to decide what we are going to give up.

Q. Apart from the pressures that have been placed on the funds of the state, has the payment of welfare benefits to strikers caused any problems in administration? A. The

36 administrative machinery often comes close to breaking. Near riots have resumed as the Welfare Department found in Chester, when the Westinghouse strike started. What happens, you see, is that the strikers in effect take over the welfare office

by their numbers and regular welfare recipients, regular welfare recipients, their checks and problems are pushed aside. All sorts of problems can occur. So, you have a good deal of administrative problems. Problems of sheer numbers and the fact that the welfare office is not organized in order to handle that situation.

Q. Dr. Northrup, based upon your study and your opinion, is there any evidence the length of a strike or the amount which is involved in the settlement have increased as a result of welfare payments made to strikers? A. Let me first of all say the length of a strike and the amount of a settlement may be completely variable. Faced with an inflationary situation in which the workers on strike are being compensated and have therefore no urgent desires to return to work, the employer may, for example, decide that it's better to give in early and give a large settlement rather than take a long strike.

37 On the other hand, the employer may feel he is unable to meet these demands which he feels are exorbitant and hold out. But the strike lasts a lot longer because the workers are supported by the tax funds.

Let me put it this way: It is very difficult to prove that a strike lasts "X" length of time or "Y" length of time because of one variable which may be significant, but not the only variable. However, I have yet to meet a labor leader or a management representative who did not believe that the effect of welfare payments, to strikers is to make the strike longer and settlement higher. Both believe that.

In my thirty years experience, when I find labor and management are so unanimous, I'm very much inclined to believe then what they are talking about.

Q. Has there been any statements by union leaders, strikes votes or otherwise, that indicate that welfare benefits are playing a part in unions settling the strikes? A. Oh, yes. There have been dramatic ones.

For example, both management and union officials were quoted in the General Motors strike to the effect that there was no pressure from the rank and file to settle, and that the rank of file was not hurting. And welfare benefits were
38 a factor. At the end of the General Electric Strike, both big locals in New York, Schenectady and Syracuse, voted against the agreed contract. When the vote came up, in Cleveland, a union official was quoted over the radio as saying, "Don't pay any attention to those votes in Schenectady and Syracuse. They get unemployment compensation and you don't . . ." And now the same thing may be said about welfare. Union officials made it clear that this is a factor.

Q. This is not an atypical example? A. Oh, no.

Q. Again, based upon your experience and studies, has welfare assistance, where welfare is not involved, have you found any evidence of greater violence or a greater economic stagnation or hardship as compared with the states which grant such assistance? A. No. I don't think any case can be made one way or the other. Violence, in my experience, is largely a function of the extent of police protection and the extent of where the union is badly losing the strike, to the extent that workers are drifting in and strikers are appearing on the job. When the latter occurs, sometimes union seem to turn to violence as a means to
39 "persuade" the rank of file that they shouldn't return to work. But, there has been none of that in my experience recently. If violence occurred at a particular strike, I would have to investigate the total situation before I could be certain why the violence occurred. It does not seem likely to me, that assistance or non-assistance had anything to do with it in the past.

Q. Is there any correlation between the availability of welfare assistance to strikers and the economic stagnation that can result from a strike? A. I think to the extent that welfare payments to strikers induce a strike to last longer and employers to grant a larger, and therefore more inflationary and less competitive settlement, the result may force the company into a

position where it is no longer competitive, and if it can't sell its good, it can't employ people. So, I would say the extent to which welfare is paid would well render a plant or area noncompetitive in competition with other plants in other areas and therefore stagnation is likely to occur.

Q. Dr. Northrup, it has been said that the difference in purpose between unemployment compensation laws and the AFDC-E program justify any dissimilar treatment of
40 strikers. Do you agree with that argument? A. Well, the argument is classic nonsequitur. It is true that the purpose of unemployment compensation and welfare are quite different. Unemployment compensation is conceived as a right, a payment to workers to provide for a short term unemployment to tide them over between jobs. And the fact that it's a term thing, twenty-six weeks or sometimes longer is indicative of that fact.

Now, welfare is designed to take care of people who are suffering great disability, who are unable to care for themselves like dependent children, blind people, those who suffer some great misery and basically are considered unemployable or incapable of getting work. A clear definition of that shows that it wasn't conceived for strikers. As a matter of fact, welfare payments to strikers, pro or con, do not appear in the laws which go back to 1930 because it simply never was conceived. It was beyond anybody's imagination that it would be paid to strikers.

I would say, in answer to your question, neither unemployment compensation nor welfare should be paid to strikers because strikers are neither temporarily unemployed and seeking work, and therefore, eligible for unemployment compen-
41 sation; nor are they without jobs and unable to get jobs.

They are virtually refraining from work, which is their right, but they are not doing something which in my judgment should be supported by public funds.

Q. Based upon all the factors that you have mentioned today, Dr. Northrup, and the preliminary findings of your studies, what would you conclude is the impact that welfare to strikers

is having on the process of collective bargaining? A. It cannot help but have a pernicious effect on collective bargaining. Collective bargaining works, because the parties know that if they don't move towards an agreement they will get hurt. A strike, to be effective, must hurt both sides. It is the strike and fear of a strike that causes compromise and agreement and the proof of the pudding is that such a situation exists on the railroad, where the parties know they won't be allowed to strike or if they do strike, the strike will be very short. So, they don't attempt to reach an agreement except with the impact of a government decision in most cases.

Now, if one party is not going to be hurt by a strike,
42 obviously collective bargaining really can't work. This is the situation that we have when one party is compensated by public funds. For that reason, I do not think that collective bargaining can in fact exist if we continue to support strikes by paying public benefits to private strikers. It seems to me, that if this is going to be done, why then the institution of collective bargaining should be regarded as outmoded and we should turn to some form of compulsory arbitration with strikes outlawed. I would regret this very much because I feel that this would have inhibiting effects on enterprise and innovation, and might mark the beginning of the United States as a second class industrial power. But, I cannot see how collective bargaining can function effectively if the trend towards welfare benefits for strikers continue at the present pace.

Mr. Cohen: Thank you, I have no further questions. But, I understand Mr. Kramer who, as I said previously, is the attorney for ITT in that case which is pending in the Supreme Court has a few questions.

By Mr. Kramer:

Q. Dr. Northrup, are you familiar with the case of
43 ITT Lamp Division, International Telephone and Tele-

graph Corporation versus Steven Minter of the Massachusetts Department of Welfare? A. I am.

Q. Dr. Northrup, have you had a previous conversation with myself relating to the case of ITT v. Minter? A. Yes, I have.

Q. Dr. Northrup, did you have Mr. Cowin prepare certain statistics under your direction for use in the ITT case? A. Yes, I did.

Q. I hand you what has been marked as Exhibit F with pages F-1 through F-14 and ask you to identify whether these documents contains these statistics prepared by Mr. Cowin pursuant to your direction for use in the ITT case? A. It does.

Q. And that document was intended to be used for the petition for rehearing in the ITT case currently in the Supreme Court? A. Yes, it was.

Q. Is the information contained on pages F-3 to F-14 typical or atypical of the material you have gathered in your study of this area? A. Oh, it's typical all right.

44 Q. Does the information contained on F-3 to F-14, in your opinion as an expert in this area, provide evidence of the fact that welfare assistance to strikers has had a substantial impact or has a substantial impact on the collective bargaining process? A. I'm sure it does.

Q. Would you explain why it does? A. Well, as I explained in answers to a question by Mr. Cohen earlier, the collective bargaining process depends on the final analysis for its effectiveness on the right to strike, and the strike hurting both parties.

It's obviously very difficult for the public to understand, but it's a fact that a strike, although the opposite of a peaceful collective bargaining, in a sense, tends to maintain peaceful collective bargaining. It's as I said before, the knowledge that a strike hurts both parties, and the fact that the outcome

of a strike is indeterminable and the experience that one has had with a strike which induces one to temper his wishes and to look for means of settlement by working things out by compromise and other methods. Now, if instead of a strike, one is faced with government board—like the Railway
45 Labor Act, or if instead of a strike being costly, one is compensated if on strike, or one party is compensated, then the strike doesn't hurt the other party and the strike is not feared, because the only way to settle a contract is to get somebody else to decide the case or, in the case of welfare, to accede to the demands of one side because one side is being hurt while the other isn't.

Q. Dr. Northrup, from what you answered, I take it that you would agree with the various opinions of the United States Supreme Court holding that the right to strike is really at the core of the collective bargaining process and that the exercise of economic weapons is inherent in the collective bargaining process? A. I certainly agree with it. It's not only inherent, it's an indispensable factor. As a matter of fact, I'm the author of several works which make that point very forcefully. I mentioned, "Government and Labor", published in 1963, which I'm a coauthor. I might also mention a 1966 book called, "Compulsory Arbitration and Government Intervention in Labor Disputes", of which I'm the author, which attempts to assess this situation, not only in the United States, but throughout the free world. I was the earliest one to point out the defects of the Railway Labor Act and its impact on
46 collective bargaining in an article in 1946. And the last of a long series of works on that subject is appearing in the Industrial and Labor Relations Review for October, 1971.

So, I've been very concerned all of my life with the need to preserve the right to strike in order to make the collective bargaining system work. Not because I think striking is fine, but because the threat of something worse makes you come to an agreement. If something worse doesn't exist, if you are going to

be paid for striking, then the collective bargaining system cannot work.

Mr. Kramer: I have no further questions.

CERTIFICATE

I hereby certify that I have read the preceding questions and answers, and the information contained therein is true and correct.

/s/ Herbert R. Northrup
Dr. Herbert R. Northrup

Sworn and subscribed before me this 10th day of September, 1971.

Sig and Notary Stamp Illegible

January 1971

Herbert R. Northrup

1961-

Professor of Industry
Wharton School of Finance & Commerce
University of Pennsylvania

1964-1969

Chairman, Department of Industry

1964-

Director, Industrial Research Unit

1968-

Chairman, Labor Relations Council

Personal: Born—New Jersey, March 6, 1918 Married, five children

Education:

A. B. Duke University, 1939
A. M., Harvard University, 1941
Ph.D., Harvard University, 1942 (Economics)

Previous Employment:

1958-1961

Employee Relations Consultant
General Electric Company
Full staff responsibility for all aspects of employee relations covering seventy-one General plants employing 100,000 employes. Member national negotiating committee and handled third-stage grievances under national contracts.

1955-1958

Vice President, Industrial Relations
Penn Texas Corporation
Full staff responsibility for all phases of personnel and

union relations in multiplant diversified company of 15,000 employees, including management organization of subsidiaries, executive recruitment, relations with ten unions, pensions, insurance, and plant security. Left when company was forced to sell many subsidiaries to meet over-commitments from unsuccessful proxy fights.

1952-1955

Industrial Relations Consultant
Ebasco Services Incorporated
Consultation with industrial clients on a variety of management and personnel problems including organization and controls, union relations, communications, and executive recruitment. Developed more consulting and business than anyone in history of department. Left to go with Penn-Texas which had been a client.
(Also served as Consultant, U. S. Salary Stabilization Board during 1952.)

1949-1952

Labor Economist
National Industrial Conference Board
Research and consultation on various economic and personnel problems.

1945-1949

Assistant Professor, Industrial Relations, Columbia University
Visiting Professor, Summer Sessions, New York University, University of California (Berkeley), and Columbia Business School
In addition to teaching, considerable time spent in research and management consultation.

1943-1945

Economist and Senior Hearing Officer, National War Labor Board, Detroit and New York Regions.

1942-1943

Instructor in Economics, Cornell University

Bibliography:

Author of over 150 articles in various professional, business, and popular journals and of ten books, including co-author of *The Economics of Labor Relations,* 6th Edition, 1969, the most widely used college text in the field, and *Government and Labor,* 1963; author *Organized Labor and the Negro* 1944; *Boulwarism,* 1964; *Compulsory Arbitration and Government Intervention in Labor Disputes,* 1966; *Negro Employment in Basic Industry,* 1970; *Negro Employment in Southern Industry,* 1971; and co-editor of *Readings in Labor Economics,* 1965; *Negro and Employment Opportunity,* 1965; and *Hours of Work,* 1965.

UNITED STATES COURT OF APPEALS
For the Third Circuit

Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz, *Appellants,* *vs.* Lloyd W. McCorkle, et al.	Nos. 71-1773, 71-774, 71-1775.

SUR PETITION FOR REHEARING

Present:

Seitz, *Chief Judge,* McLaughlin, Van Dusen, Aldisert, Adams, Gibbons and Rosenn, *Circuit Judges.*

The petition for rehearing en banc of this Court's panel order of November 22, 1972, filed by Chamber of Commerce of the United States of America in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available cricuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By The Court,
Arlin M. Adams,
Judge.

Dated: December 20, 1972

UNITED STATES CONSTITUTION
ARTICLE III

Section 2, Clause 1.—The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

UNITED STATES CONSTITUTION
ARTICLE VI

Clause 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

National Labor Relations Act, as Amended, 29 U. S. C. § 151

§ 151. Findings and declaration of policy

* * * * *

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the

purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 136.

NATIONAL LABOR RELATIONS ACT, 29 U. S. C. § 158

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

* * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existance of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days and after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer

engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

SOCIAL SECURITY ACT OF 1935, AS AMENDED, 42 U. S. C. § 602 ET SEQ.

§ 602. State Plans for Aid and Services to Needy Families With Children; Contents; Approval by Secretary

(a) A State plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness; (5) provide (A) such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary to be necessary for the proper and efficient operation of the plan, and (B) for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community services aides, in the administration of the plan and for the use of non-paid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency;

and (6) provide that the State agency will make such reports, in such forms and containing such information, as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports; (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; (8) provide that, in making the determination under clause (7), the State agency—

(A) shall with respect to any month disregard—

(i) all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or part-time student who is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment, and

(ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month (except that the provisions of this clause (ii) shall not apply to earned income derived from participation on a project maintained under the programs established by section 632(b)(2) and (3) of this title); and

(B) (i) may, subject to the limitations prescribed by the Secretary, permit all or any portion of the earned or other income to be set aside for future identifiable needs of a dependent child, and (ii) may, before disregarding the amounts referred to in subparagraph (A) and clause (i) of this subparagraph, disregard not more than $5 per month of any income;

except that, with respect to any month, the State agency shall not disregard any earned income (other than income referred to in subparagraph (B)) of—

(C) any one of the persons specified in clause (ii) of subparagraph (A) if such person—

(i) terminated his employment or reduced his earned income without good cause within such period (of not less than 30 days) preceding such month as may be prescribed by the Secretary; or

(ii) refused without good cause, within such month as may be prescribed by the Secretary, to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined by the State or local agency administering the State plan, after notification by him, to be a bona fide offer of employment; or

(D) any of such persons specified in clause (ii) of subparagraph (A) if with respect to such month the income of the persons so specified (within the meaning of clause (7)) was in excess of their need as determined by the State agency pursuant to clause (7) (without regard to clause (8)), unless, for any one of the four months preceding such months, the needs of such persons were met by the furnishing of aid under the plan;

* * * * *

§ 606. Definitions.

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

(b) The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipient makes application for aid) medical care in behalf of any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home if such needs are taken into account in making the determination under section 602(a)(7) of this title) which

do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual, but only with respect to a State whose State plan approved under section 602 of this title includes provision for—

(A) determination by the State agency that the relative of the child with respect to whom such payments are made has such inability to manage funds that making payments to him would be contrary to the welfare of the child and, therefore, it is necessary to provide such aid with respect to such child and relative through payments described in this clause (2);

(B) undertaking and continuing special efforts to develop greater ability on the part of the relative to manage funds in such manner as to protect the welfare of the family;

(C) periodic review by such State agency of the determination under clause (A) to ascertain whether conditions justifying such determination still exist, with provision for termination of such payments if they do not and for seeking judicial appointment of a guardian or other legal representative, as described in section 1311 of this title, if and when it appears that the need for such payments is continuing, or is likely to continue, beyond a period specified by the Secretary;

(D) aid in the form of foster home care in behalf of children described in section 608(a) of this title; and

(E) opportunity for a fair hearing before the State agency on the determination referred to in clause (A) for any individual with respect to whom it is made;

(c) The term "relative with whom any dependent child is living" means the individual who is one of the relatives specified in subsection (a) of this section and with whom such child is living (within the meaning of such subsection) in a place of residence maintained by such individual (himself or together with any one or more of the other relatives so specified) as his (or their) own home.

(d) The term "family services" means services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family, and such other services as will assist members of a family to attain or retain capability for the maximum self-support and personal independence.

(e)(1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

(B) such services as may be specified by the Secretary; but only with respect to a State whose State plan approved

under section 602 of this title includes provision for such assistance.

(2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate.

§ 607. Dependent Children of Unemployed Fathers; Definition.

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a) (2) of this title, who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a) (1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

(b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title—

(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—

(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

(B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and

(C) (i) such father has 6 or more quarters of work (as defined in subsection (d) (1) of this sec-

tion) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d) (3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application for such aid; and

(2) provides—

(A) for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) of this section will be referred to the Secretary of Labor as provided in section 602(a)(19) of this title within thirty days after receipt of aid with respect to such children;

(B) for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education in the State, designed to assure maximum utilization of available public vocational education services and facilities in the State in order to encourage the retraining of individuals capable of being retrained; and

(C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—

(i) if, and for so long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

(c) Notwithstanding any other provisions of this section, expenditures pursuant to this section shall be excluded from aid to families with dependent children (A) where such expenditures are made under the plan with respect to any dependent child as defined in subsection (a) of this section, (i) for any part of the 30-day period referred to in subparagraph (A) of subsection (b)(1) of this section, or (ii) for any period prior to the time when the father satisfies subparagraph (B) of such subsection, and (B) if, and for as long as, no action is taken (after the 30-day period referred to in subparagraph (A) of subsection (b)(2) of this section), under the program therein specified to refer such father to the Secretary of Labor pursuant to section 602(a)(19) of this title.

(d) For purposes of this section—

(1) the term "quarter of work" with respect to any individual means a calendar quarter in which such individual received earned income of not less than $50 (or which is a "quarter of coverage" as defined in section 413(a)(2) of this title), or in which such individual participated in a community work and training program under section 609 of this title or any other work and training program subject to the limitations in section 609 of this title, or the work incentive program established under part C;

(2) the term "calendar quarter" means a period of 3 consecutive calendar months ending on March 31, June 30, September 30, or December 31; and

(3) an individual shall be deemed qualified for unemployment compensation under the State's unemployment compensation law if—

(A) he would have been eligible to receive such unemployment compensation upon filing application, or

(B) he performed work not covered under such law and such work, if it had been covered, would

(together with any covered work he performed) have made him eligible to receive such unemployment compensation upon filing application.

REGULATION OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE PRIOR TO JULY 12, 1973

Chapter II, Title 45, C. F. R.

§ 233.100 Dependent children of unemployed fathers.

(a) *Requirements for State Plans.* If a State wishes to provide AFDC for children of unemployed fathers, the State plan under Title IV—Part A of the Social Security Act must, except as specified in paragraph (b) of this section:

(1) Include a definition of an unemployed father which shall apply only to families determined to be needy in accordance with the provisions in § 233.20 and shall include any father who:

(i) Is employed less than 100 hours a month; or

(ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the 2 prior months and is expected to be under the standard during the next month.

(2) Include a definition of a dependent child which shall include any child of an unemployed father (as defined by the State pursuant to subparagraph (1) of this paragraph) who would be, except for the fact that his parent is not dead, absent from the home, or incapacitated, a dependent child under the State's plan approved under section 402 of the Act.

(3) Provide for payment of aid with respect to any dependent child (as defined by the State pursuant to subparagraph (2) of this paragraph) when the conditions set forth in subdivisions (i), (ii), and (iii) of this subparagraph are met:

(i) His father has been unemployed for at least 30 days prior to the receipt of such aid.

(ii) Such father has not without good cause, within such 30-day period prior to the receipt of such aid, refused a bona fide offer of employment or training for employment. Before it is determined that a father has refused a bona fide offer of employment or training for employment without good cause, the agency must make a determination that such an offer was actually made. (In the case of offers of employment made through the public employment or manpower agencies, the determination as to whether the offer was bona fide, or whether there was good cause to refuse it, will be made by that office or agency.) The father must be given an opportunity to explain why such offer was not accepted. Questions with respect to the following factors must be resolved:

(*a*) That there was a definite offer of employment at wages meeting any applicable minimum wage requirements and which are customary for such work in the community;

(*b*) Any questions as to the father's inability to engage in such employment for physical reasons or because he has no way to get to or from the particular job; and

(*c*) Any questions of working conditions, such as risks to health, safety, or lack of workmen's compensation protection.

(iii) Such father (*a*) has six or more quarters of work (as defined in subdivision (iv) of this subparagraph), within any 13-calendar-quarter period ending within 1 year prior to the application for such aid, or (*b*) within such 1-year period, received unemployment compensation under an unemployment compensation law of a State or of the United States, or was qualified under the terms of subdivision (v) of this subparagraph) for such compensation under the State's unemployment compensation law.

(iv) A "quarter of work" with respect to any individual means a period (of 3 consecutive calendar months ending on

March 31, June 30, September 30, or December 31) in which he received earned income of not less than $50 (or which is a "quarter of coverage" as defined in section 213(a)(2) of the Act), or in which he participated in a community work and training program under section 409 of the Act or any other work and training program subject to the limitations in such section 409, or the work incentive program established under part C of title IV of the Act.

(v) An individual shall be deemed "qualified" for unemployment compensation under the State's unemployment compensation law if he would have been eligible to receive such benefits upon filing application, or he performed work not covered by such law which, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such benefits upon filing application.

(4) Provide for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education to assure maximum utilization of available public vocational education services and facilities in the State to encourage the retraining of individuals capable of being retrained.

REGULATION OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, ISSUED JULY 12, 1973

Chapter II, Title 45, C. F. R.

Chapter II—Social and Rehabilitation Service (Assistance Programs), Department of Health, Education, and Welfare

Part 233—Coverage and Conditions of Eligibility in Financial Assistance Programs

Dependent Children of Unemployed Fathers

Notice of proposed regulations regarding the definition of unemployed father in the program of Aid to Families with De-

pendent Children was published in the FEDERAL REGISTER of January 3, 1973 (38 FR 49). The notice presented two alternatives relating to the inclusion of fathers who are on strike or otherwise disqualified for unemployment compensation:

A: Give States option as to including or excluding;

B: Establish hours of work as the sole criterion, thus precluding exclusion of strikers otherwise eligible.

Thousands of comments were received, coming from all States. As could be expected, most of the responses were from management and labor; there were also many from private citizens and a number from Congressmen.

It is apparent from these comments that no one solution is going to satisfy all those who wrote. There was a fully predictable, although relatively close, division.

After consideration of the conflicting views presented, the Department has adopted alternative "A", leaving the States free to determine whether or not those on strike qualify for AFDC-UF. This is the only course fully consistent with the "New Federalism" policies of this Administration. This permits States wide flexibility in the administration of Federal/State programs, so that they may determine the best course of action in the light of their individual situations and varying circumstances. A Federal mandate either to include or exclude strikers would be undue interference with States' decisions on the extent of the program. If such a mandate is desired it should be set by Congress through the customary legislative process. Accordingly, alternative "A" is considered the acceptable alternative and is reflected in the amended regulation.

Section 233.100(a)(1), Chapter II, Title 45 of the Code of Federal Regulations is revised to read as follows:

§ 233.100 Dependent children of unemployed fathers.

(a) *Requirements for State plans.* * * *

(1) Include a definition of an employed father which shall apply only to families determined to be needy in accordance with

the provisions in § 233.20 of this chapter. Such definition must include any father who:

(i) Is employed less than 100 hours a month; or

(ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the prior 2 months and is expected to be under the standard during the next month;

except that, at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.

* * * * *

(Sec. 1102, 49 Stat. 647 (42 U. S. C. 1302))

Effective date. The regulations in this section shall be effective on July 12, 1973.

Dated: July 6, 1973.

James S. Dwight, Jr.,
Administrator, Social and Rehabilitation Service.

Approved: July 9, 1973.
Caspar W. Weinberger,
Secretary.

[FR Doc. 73-14304 Filed 7-11-73; 8:45 a.m.]

NEW JERSEY ASSISTANCE FOR DEPENDENT CHILDREN LAW, NJSA 44:10-1 ET SEQ.

44:10-1. Definitions.

As used in this act and for the purpose of the determination of eligibility to receive financial assistance under the provisions of this act, the following words shall have the following meaning, unless the context indicates another meaning:

(a) "Assistance for dependent children" means the assistance and other services to be extended under this act to or for needy dependent children and the parents and relatives with whom they are living for the following purposes:

(1) To provide for the care of needy dependent children in their own homes or in the homes of relatives, under standards and conditions compatible with decency and health.

(2) To help maintain and strengthen family life, and

(3) To help such parents or relatives to attain the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.

(b) "Bureau of Assistance" means the Bureau of Assistance of the Department of Institutions and Agencies.

(c) "Dependent child" means a child under the age of 18, or under the age of 21 and a student regularly attending school, college or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment, who

(1) Has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or, when living with both parents, has been deprived of parental support or care by reason of the unemployment of his father or the insufficient earnings of his parents, and

(2) Is living in New Jersey with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew or niece, in a place of residence maintained by one or more of such relatives as his or their home, and

(3) Is found, after due investigation and determination, according to standards and procedures established pursuant to this act, to be in need of financial assistance.

(d) "Parent or relative with whom a dependent child is living" means a person

(1) Who is related to the dependent child, in the manner prescribed in subsection (c)(2) of this section, and

(2) With whom the dependent child is living in a place of residence maintained by one or more of such relatives as his or their own home, and

(3) Who is found, after due investigation and determination, according to standards and procedures established pursuant to this act, to be in need of financial assistance.

* * * * *

NEW JERSEY PUBLIC ASSISTANCE LAW
NJSA 44:8-107 ET SEQ.

44:8-107. Short title.

This act may be cited as the "General Public Assistance Law."

44:8-108. Definitions.

As used in this act:

"Commissioner" means the Co-ordinator of the Department of Economic Development;

"Department" means the Department of Economic Development;

"Municipality" shall include any city, borough, township, town, village or municipality governed by a board of commissioners or an improvement commission;

"Public assistance" means assistance rendered to needy persons not otherwise provided for under the laws of this State, where such persons are willing to work but are unable to secure employment due either to physical disability or inability to find employment, and includes what is commonly called "relief" or "emergency relief";

"State aid" means State aid for public assistance or relief as in this act prescribed and provided for;

"Year" means calendar year.

* * * * *

44:8-114. Municipalities to provide public assistance; administration

Every municipality shall provide public assistance to the persons eligible thereto, residing therein or otherwise when so provided by law, which shall be administered by a local assistance board according to law and in accordance with this act and with such rules and regulations as may be promulgated by the commissioner.

REGULATIONS

M. A. 1.006
Rev. 3/57

State of New Jersey

Department of Institutions and Agencies

Division of Welfare—Bureau of Assistance

Title: Reimbursement

Subject: Employability as a Condition of Eligibility

A. Citation of Statute and Constitution

Chapter 156, P. L. 1947 (R. S. 44:8-108) defines reimbursable public assistance as "assistance rendered to needy persons not otherwise provided for under the laws of this State, *where such persons are willing to work* but are unable to secure employment due either to physical disability or inability to find employment."

The Constitution of New Jersey 1947, Article I, paragraph 19, guarantees that "Persons in private employment shall have the right to organize and bargain collectively."

B. Interpretation and Policy

It may be inferred from the quoted section of the statute that persons unwilling to work are ineligible for public assistance. However, for purposes of public administration, the phrase "unwilling to work" must be defined as objectively as possible. For this purpose, therefore, it is interpreted that a person may be considered unwilling to work only when all of the elements of either (1) or (2) following are present:

(1) He is physically and mentally capable of engaging in remunerative employment or self-employment; and he refuses, without just and reasonable cause, to seek such employment or self-employment, or to make himself available for referral to, or consideration by prospective employers; OR

(2) He is physically and mentally capable of engaging in remunerative employment or self-employment; and such employment or self-employment is available to him; and he refuses, without just and reasonable cause, to accept such employment or engage in such self-employment.

At the same time, the effect of the Constitutional provision cited above must be considered. The Constitutional guarantee of the "right to organize and bargain collectively" implies the right of the individual to participate in a bona fide labor dispute as between the employer and the collective bargaining unit by which the individual is represented. Moreover, a "strike", when lawfully authorized and conducted, is recognized as an inherent and lawful element of the process of bargaining collectively and of resolving labor disputes. Accordingly, when an individual is participating in a lawful "strike," he may not be considered merely because of such participation, as refusing to work without just cause.

C. Regulations

Based on the foregoing statement of interpretation and policy, the following regulations are established:

1. Employability is a resource to be considered in determining eligibility for public assistance.

2. When it is clearly established that an individual is able to work, and that he refuses, without just and reasonable cause, to seek work, or to make himself available for referral to and consideration by prospective employers, he shall be deemed ineligible for public assistance.

3. When it is clearly established that an individual is able to work, that a specific job within his capabilities is available to him, and that there is no just and reasonable cause for a refusal to accept the job so available, if he nevertheless refuses to accept the employment, he shall be deemed ineligible for public assistance.

4. No individual shall be presumed to be unwilling to work, or to be wrongfully refusing to accept suitable employment, merely because he is participating in a lawful labor dispute.

5. An individual who is participating in a lawful labor dispute, and who is needy, has the same right to apply for public assistance, for himself and his dependents, as any other individual who is needy.

6. In the case of an applicant for public assistance who is participating in a lawful labor dispute, there shall be an investigation of need and other conditions of eligibility, and an evaluation of income and resources, in the same way and to the same extent as in all other cases. In such instances, "strike benefits" or other payments available to the individual from the labor union or other source, shall be considered a resource and shall be determined and accounted for.

7. The right of persons to bargain collectively with an employer does not imply the right to bargain collectively with the public assistance agency; and the right of individuals to apply for public assistance does not carry with it a right to apply collectively for public assistance through an agent or representative.

8. If an individual is found to be disqualified for public assistance because of wrongful refusal to seek or accept available employment (as provided in regulations No. 2 and No. 3 above), such disqualification shall not affect the eligibility of his spouse, minor children, or other persons in his household, if they are needy persons.

9. Assistance which is granted consistently with these regulations and all other eligibility conditions, to a needy person, will not be excluded from matching State aid merely because such person is engaged in a lawful labor dispute.

Department of Institutions and Agencies
/s/ Irving Engelman
Irving Engelman, Chief
Bureau of Assistance

IE/MCRd
Approved
Elmer V. Andrews, Director
Division of Welfare
Official Regulation 1.006, revised 3/57
Destroy Regulation 1.006, revised 3/1/48

NEW JERSEY ASSISTANCE TO FAMILIES OF THE WORKING POOR LAW, NJSA 44:13 ET SEQ.

44:13-1. Legislative findings.

The Legislature hereby finds and declares that it is in the public interest for the State to provide financial assistance to New Jersey families with children in which both parents are present in the home and who otherwise meet the eligibility criteria set forth in this act by virtue of inadequate income for the support of the family. The Legislature further finds that such families are a unique class, distinguishable in their composition and needs from other categories of persons benefited by other programs of assistance established by law. The Legislature further finds that such families should be entitled to receive the benefits available under the "New Jersey Medical Assistance and Health Service Act."
alb

44:13-2. Establishment of program; administration.

There is hereby enacted by the State of New Jersey a program of assistance to be known as "Assistance to the Families of the

Working Poor" which shall benefit all of the citizens of New Jersey meeting the eligibility provisions more particularly set forth in section 3 of this act. This program shall be administered by all of the county welfare boards of this State under the direction of the Commissioner of Institutions and Agencies as provided in this Title.

44:13-3. Definitions.

As used in this act and for the purposes of determining eligibility to receive financial assistance under this act, the following words shall have the following meanings:

a. "Assistance to the Families of the Working Poor" means the financial assistance and other services to be extended under this act to those families residing in New Jersey which consist of a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child under the age of 18 residing with them, who shall be either the natural child of both, the natural child of one and adopted by the other, or a child adopted by both, and have (i) no income or insufficient income and (ii) no other resources or insufficient other resources, where such absence or insufficiency of income or resources is not the result of a voluntary cessation of employment within 90 days prior to the date of application, or the result of a voluntary assignment or transfer of property within one year prior to the time of application for the purpose of qualifying for public assistance;

b. "Adjusted gross income" means the total of monthly unearned income and monthly earned income of all employed individuals in the family, except for those individuals whose income is required to be disregarded under the provisions of this subsection, less the first $60.00 earned by each person whose income is included in adjusted gross income. In computing the income of a family as defined in this act there shall be disregarded the *earned* income of any minor child under 16, and the income of a minor child under 18 if he or she is attending on a full time basis an accredited educational institution;

c. "Insufficient income" means that the adjusted gross income of the family is less than 66⅔% of the standard applicable to the size of the applicant family established by the Division of Public Welfare for the program of aid to dependent children authorized under P. L. 1959, c. 86 (C. 44:10-1 et seq.);

d. "Other resources" means all property and assets, as otherwise defined by the Division of Public Welfare for the program of aid to dependent children authorized under P. L. 1959, c. 86 (C. 44:10-1 et seq.), legally or beneficially owned by a member or members of the families which are or can be readily made available for the use of the family;

e. "Insufficient other resources" means that other resources are insufficient as determined by standards set forth by the Director of the Division of Public Welfare pursuant to P. L. 1959, c. 86 (C. 44:10-1, et seq.); and

f. "Commissioner" shall mean the Commissioner of Institutions and Agencies.

44:13-4. Application for assistance; form; signature; other financial assistance from state; failure of father to improve employment situation.

a. A family wishing to make application for assistance under the provisions of this act shall do so by securing from the county welfare board offices an application, the form of which shall be prescribed by the Division of Public Welfare. Said application shall be completed and signed by both parents, except that if a parent is unavailable to sign the application for reasons beyond the family's control one signature will suffice. In that event the non-signatory parent shall be required to annex his signature as promptly as he is available for such purpose. Said application shall state that the amounts of assistance received by the applicants, if they are eligible, shall constitute a debt to the State of New Jersey as required by the provisions of this act.

b. No family or member thereof for whom financial assistance is being paid under the provisions of this act shall receive, during the same period, any other financial assistance from the State or any political subdivision thereof with respect to any maintenance requirements or other items for which allowance is made in the assistance grant paid pursuant to this act.

c. No family shall be entitled to receive financial assistance under this act if the father refuses, without good cause, to accept employment, better employment or training for employment or better employment.

44:13-5. Powers of commissioner; rules, regulations and orders; obtaining maximum federal aid.

Under general policies establish by the State Board of Control consistent with the provisions of this act, the commissioner is authorized, directed and empowered to issue, or to cause to be issued by the appropriate departmental officers or agencies, in accordance with the "Administrative Procedure Act" (P. L. 1968, c. 410), all necessary rules and regulations and administrative orders, and to do or cause to be done all other acts and things necessary to implement the provisions of this act. He shall endeavor to obtain the maximum possible Federal financial participation with respect to all or any portion of the program established by this act, insofar as it is feasible to do so consistently with the provisions of this act.

44:13-6. Duties of commissioner.

The commissioner is directed to do the following:

a. Require that the program of assistance provided by this act shall be uniformly administered throughout all the counties of this State;

b. Require that all families wishing to make application for assistance under this program shall have the opportunity to do so, in the manner described in this act and that assistance shall be furnished with reasonable promptness to eligible families;

c. Require that safeguards be provided restricting the use or disclosure of information concerning applicants and recipients of aid under the provisions of this act;

d. Arrange for appropriate services and cooperation with other agencies so that maximum opportunities for employment or improved employment and training for employment will be available to recipients of assistance under this program;

e. Prescribe the conditions under which financial assistance will be denied to any family in which the father refuses, without good cause, to accept employment, better employment, or training for employment or better employment;

f. Provide a procedure whereby an applicant for or a recipient of assistance under the provisions of this act shall have an opportunity to appeal an action or decision of a county welfare board to the Division of Public Welfare of the Department of Institutions and Agencies. Such appeal shall be taken within 90 days from the date of the action or decision of the county welfare board upon which the applicant or recipient bases his appeal.

NEW JERSEY UNEMPLOYMENT COMPENSATION ACT, NJSA 43:21-1 ET SEQ.

43:21-1. Short title

This chapter shall be known and may be cited as the "unemployment compensation law".

43:21-2. Declaration of state public policy

As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection

against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state requires the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed after qualifying periods of employment.

43:21-4. Benefit eligibility conditions

An unemployed individual shall be eligible to receive benefits with respect to any week only if it appears that:

(a) He has registered for work at, and thereafter continued to report at, an employment office in accordance with such regulations as the division may prescribe, except that the division may, by regulation, waive or alter either or both of the requirements of this subsection as to individuals attached to regular jobs, and as to such other types of cases or situations with respect to which the division finds that compliance with such requirements would be oppressive, or would be inconsistent with the purpose of this act; provided, that no such regulation shall conflict with subsection (a) of section 43:21-3 of the Revised Statutes.

(b) He has made a claim for benefits in accordance with the provisions of subsection (a) of section 43:21-6 of the Revised Statutes.

(c) He is able to work, is available for work, and has demonstrated that he is actively seeking work, except as hereinafter provided in this subsection or in subsection (f) of this section:

(1) No woman shall be deemed to be able or available for work during the 4 weeks immediately before the expected birth of her child or the 4 weeks immediately follow-

ing the birth of her child, in either of which cases the division may require the production of a doctor's certificate to establish such dates;

(2) The director may, in his discretion, modify the requirement of actively seeking work if, in his judgment, such modification of this requirement is warranted by economic conditions;

but no individual, who is otherwise eligible, shall be deemed ineligible, or unavailable for work, because he is on vacation, without pay, during said week, if said vacation is not the result of his own action as distinguished from any collective action of a collective bargaining agent or other action beyond his individual control.

(d) He has been totally or partially unemployed for a waiting period of 1 week in the benefit year which includes that week. When benefits become payable with respect to the third consecutive week next following the waiting period, he shall be eligible to receive benefits as appropriate with respect to the waiting period. No week shall be counted as a week of unemployment for the purposes of this subsection:

(1) if benefits have been paid, or are payable with respect thereto; provided, that the requirements of this paragraph shall be waived with respect to any benefits paid or payable for a waiting period as provided in this subsection;

(2) if it has constituted a waiting period week under Temporary Disability Benefits Law;

(3) unless the individual fulfills the requirements of subsections (a) and (c) of this section;

(4) if it has constituted a week with respect to which it is found that his unemployment was due to a stoppage of work which exists because of a labor dispute, in accordance with the provisions of subsection (d) of section 43:21-5 of the Revised Statutes.

* * * * *

43:21-5. Disqualification for benefits

An individual shall be disqualified for benefits:

(a) For the week in which he has left work voluntarily without good cause attributable to such work, and for each week thereafter until he has earned in employment (which may be with an employing unit having in employment 1 or more individuals) at least 4 times his weekly benefit rate, as determined in each case; provided, however, that no disqualification shall be applicable to a woman who left or was separated from her work solely by reason of her pregnancy.

(b) For the week in which he has been discharged for misconduct connected with his work, and for the 5 weeks which immediately follow such week (in addition to the waiting period), as determined in each case.

(c) If it is found that he has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the director or to accept suitable work when offered him, or to return to his customary self-employment (if any) when so directed by the director. Such disqualification shall continue for the week in which such failure occurred and for the 3 weeks which immediately follow such week (in addition to the waiting period), as determined:

(1) In determining whether or not any work is suitable for an individual, consideration shall be given to the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

(2) Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (b) If the remuneration, hours, or other conditions of the work offered are substantially less favorable to the

individual than those prevailing for similar work in the locality; (c) If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

(d) For any week with respect to which it is found that his unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed; provided, that this subsection shall not apply if it is shown that:

(1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute; provided, that if in any case in which (1) or (2) above applies separate branches of work which are commonly conducted as separate businesses in separate premises are conducted in the separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment, or other premises;

* * * * *

IN THE SUPREME COURT OF THE UNITED STATES

Super Tire Engineering Company: Supercap Corporation: and A. Robert Schaevitz,
Petitioners,
vs.
Lloyd W. McCorkle, et al.,
Respondent.
No. 72-1554

State of Illinois } ss:
County of Cook }

AFFIDAVIT

Harold Finkle, being duly sworn according to law, deposes and states:

1. That he is a member of the Bar of the Court of Appeals of the State of New York and that he is House Counsel for Super Tire Engineering Company and Supercap Corporation, the appellants herein;

2. That there is attached hereto as Exhibit "A" a true and complete copy of the collective bargaining agreement executed by and between Super Tire Engineering Company, Supercap Corporation and Teamsters Local Union No. 676, affiliated with the International Brotherhood of Teamsters, etc., which contract was entered into and executed on June 25, 1971, subsequent to the commencement of this action and after the six-week-long strike which precipitated the action. The contract expires in June, 1974.

/s/ Harold Finkle

Subscribed and sworn to the 19th day of November, 1973.

/s/ Nancy Swain
Notary Public

Exhibit A

AGREEMENT

between

SUPER TIRE ENGINEERING COMPANY AND
SUPERCAP CORPORATION

and

TEAMSTERS LOCAL UNION NO. 676

INDEX

	PAGES
Introduction	1
Article 1 Scope of Agreement	1
Section 1 Classifications Covered	1
Section 2 Transfer of Company Title and Interest	1 & 2
Section 3 Recognition	2
Section 4 Union Security	2 & 3
Section 5 Hiring Additional Men	4
Section 6 Dues	4 & 5
Section 7 Work Performed by Covered Employees Only	5
Section 8 Equipment Purchase Not Required	5
Section 9 Blacklist	5 & 6
Article 2 Shop Stewards and Committeemen	6
Section 1 Appointment and Duties	6 & 7
Section 2 Super-Seniority	7
Section 3 Orders and Decisions Not to Be Made	7
Section 4 Investigation of Grievances by Shop Steward	8
Section 5 Paid for Time	8 & 9
Section 6 Non-Discrimination	9
Article 3 Absence	9
Section 1 Time Off for Union Activities	9
Section 2 Leave of Absence	9 & 10
Article 4 Seniority Principle	10
Section 1 Seniority Shall Prevail	10 & 11
Section 2 Seniority Rank and Posting	11 & 12
Section 3 (a) Seasonal or Part-Time Work	12 & 13
Section 3 (b) Protection During Revocation of License	13

Section 4 Loss of Seniority .....13 & 14
Section 5 Lay-Off and Recall .....14 & 15
(a) Notification of Recall .....15 & 16
(b) Notice of Lay-Off 16
Section 6 Military Service .....16 & 17
(b) Jury Duty 17
Section 7 (a) Promotions .....17 & 18
(b) Leaving Bargaining Unit 18
Section 8 Mergers, Consolidations, Absorptions..18 & 19
Article 5 Maintenance of Standards 19
Section 1 Protection of Conditions 19
Section 2 Extra Contract Agreements .....19 & 20
Section 3 Work Week Reduction 20
Section 4 New Equipment or Operations 20
Article 6 Grievances
Section 1 Grievance Machinery 20
Section 2 Inspection Privileges .....22 & 23
Article 7 Protection of Rights 23
Section 1 Picket Lines 23
Article 8 Separation of Employment 23
Article 9 Fidelity Bonds .....24 & 25
Article 10 Compensation and Insurance 25
Section 1 Compensation Claims 25
Section 2 25
Article 11 Conditions of Work Safety.....25 & 26
Article 12 Reports of Defective Equipment.....26 & 27
Article 13 Accidents and Reports 27
Section 1 Reporting Accidents 27
Section 2 Injury on the Job .....27 & 28
Article 14 Meal Period 28
Section 1 Lunch Period 28
Section 2 Supper Period 29

Article 15 Discharge or Suspension 29
Section 1 Cause for Dismissal or Suspension.....29-31
Section 2 Warning Notices 31
Article 16 Discrimination 31
Article 17 Subcontracting 32
Article 18 Work in Other Classifications..... 33
Article 19 Work Assignments 33
Article 20 Paid for Time 33
Section 1 General 33
Section 2 Break Periods 33
Section 3 Death in Family .....33 & 34
Section 4 Holidays .....34 & 35
Section 5 Sick Leave 35
Section 6 Time Studies 35
Article 21 Vacations .....35 & 36
Article 22 Reopening Emergency .....36 & 37
Article 23 Check-Off of Dues .....37 & 38
Article 23 A Check-Off of Drive 38
Article 24 Wages and Hours 38
Section 1 General .....38 & 39
Section 2 Pay Period 39
Section 3 Pay Day 39
Section 4 Statement of Earnings 39
Section 5 Wages—Shift Differential 39
Section 5 (a) Lie Detector Test 40
Section 6 Wages 40
Section 7 Overtime .....41 & 42
Section 8 Shifts Ending on Holidays or Week-ends .....42 & 43
Article 25 Management Security 43
Article 26 (a) Savings and Separability Clause 44
(b) Terms and Provisions Binding.....44 & 45

Article 27 General 45
Section 1 Posting of Notices 45
Section 2 Wage Executions 45
Section 3 Company Rules 45
Section 4 Uniforms and Safety Shoes 46
Section 5 Sanitary Conditions 46
Section 6 Mutual Guarantees 46
Article 28 Hospitalization and Life Insurance..... 47
Section 1 Hospitalization .....47 & 48
Section 2 Life Insurance 49
Article 29 Pension Plan 49-54
Article 30 Part-Time Employees 54
Article 31 Christmas Bonus .....54 & 55
Article 32 Working Leaders 55
Article 33 Maintenance Department 55
Article 34 Term of Agreement .....55 & 56

INTRODUCTION:

This Agreement made by and between Super Tire Engineering Company and Supercap Corporation, hereinafter referred to as the "Employer" and Teamsters Local Union No. 676, affiliated with the International Brotherhood of Teamsters, hereinafter referred to as the "Union".

ARTICLE 1 SCOPE OF AGREEMENT

Section 1 Classifications Covered

Production	Maintenance
Service Employees	Regular Truck Drivers

located at or working from the Employer's plant in Pennsauken, New Jersey, and excluding all other employees, office clerical, driver-salesmen, guards, watchmen and supervisors.

Section 2 Transfer of Company Title and Interest

This Agreement shall be binding upon the parties thereto, their successors, administrators, executors and assigns. In the event an entire operation is sold, leased, transferred, or taken over by sale, transfer, lease, assignment, receivership, or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof.

On the sale, transfer, or lease it is understood by this Section that the parties hereto shall not use any leasing devices to a third party to evade this contract. The Employer shall give notice of the existence of this Agreement to any purchaser, transferee, leasee, assignee, etc., of the operation covered by this Agreement or any part thereof. Such notice shall be in writing,

with a copy to the local Union not later than ten (10) days prior to the effective date of sale or ten (10) days subsequent to submission to a regulatory agency, whichever is the later, at the time the seller, transferee, or leasee, executes a contract or transaction as herein described.

In the event the Employer fails to give the notice herein required and/or fails to include in a contract of sale, lease or transfer a requirement that purchaser, the transferee, or the lessee assume the obligations of this contract, the Employer shall be liable to the Union for all damages sustained as a result of such failure to give notice, or such failure to require assumption of the terms of this Contract.

Section 3 Recognition

The Employer recognizes and acknowledges that the Local Union is the exclusive representative of the employees in the classifications of work covered by this Agreement, for the purpose of collective bargaining, as provided by the National Labor Relations Act.

Section 4 Union Security

All present employees in the classifications covered in Section 1 hereof who are members of the Local Union on the effective date of this subsection or on the date of execution of this Agreement, whichever is the later, shall remain members of the Local Union in good standing as a condition of employment. All present employees who are not members of the Local Union and all employees who are hired hereafter shall become and remain currently dues paid members of the Local Union as a condition of employment on and after the thirtieth (30th) day

following the beginning of their employment or on and after the thirtieth (30th) day following the date of this Agreement. This

provision shall be made and become effective as of such time as it may be made and become effective under the provisions of the National Labor Relations Act, but not retroactively.

The failure of any person to become a member of the Union at the required time shall obligate the Employer, upon written notice from the Union to such effect and to the further effect that Union Membership was available to such person on the same terms and conditions generally available to other members, to forthwith discharge such person.

Further, the failure of any person to maintain his Union membership through current payment of his dues as required herein shall, upon written notice to the Employer by the Union to such effect, obligate the Employer to discharge such person upon seven (7) days notice thereof.

In the event of any change in the law during the term of this Agreement, the Employer agrees that the Union will be entitled to receive the maximum Union security within the intent of this Section 4 which may be lawfully permissible.

—4—

Section 5 Hiring Additional Men

The Employer shall notify the Union when any new employees are to be hired. The Union shall have the right to send applicants for the job or jobs, and the Employer agrees to interview such applicants and give the same interview considerations to Union-sent applicants as is given to applicants from other sources.

This provision shall not be deemed to require the Employer to hire Union applicants or to preclude the Employer from hiring employees from other sources.

During the probationary period of sixty (60) consecutive calendar days, the employee may be discharged without further recourse, provided that the Employer may not discharge or discipline for the purpose of evading this Agreement, or discriminating against Union members.

After the probationary period, the employee shall be placed on the regular seniority list and his seniority date shall revert back to his first day of hire. In case of discharge within the probationary period the Employer shall notify the Local Union in writing.

Section 6 Dues

The Employer shall immediately upon payment notify the Shop Steward, or the Union if there is no Shop Steward, in writing, of any man who under this Agreement is required to be a member of the Union. Upon notice from the Union that an employee who has been employed for more than thirty (30)

—5—

days and has failed to tender the periodic dues and initiation fees uniformly required as a condition of acquiring and retaining membership, the Employer agrees to discharge such employee upon notice from the Union to the Employer. The Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members.

Section 7 Work Performed by Covered Employees Only

All work performed in any classification covered under this Agreement shall be performed solely by employees covered under this Agreement, and no work under any classification covered by this Agreement shall be performed by either the Employer or the Employer's representatives, such as managers, branch managers, dispatchers, supervisors, foremen, etc., except as training demonstrations, or to classify, identify, inspect, match ticket for, grade all work in process; make checks for quality control, supervise loading or unloading operations, and assist in emergencies due to an Act of God, not for the purpose of replacing employees within these classifications covered, or of evading this Agreement.

Section 8 Equipment Purchase Not Required

The Employer shall not require, as a condition of continued employment, an employee to purchase truck, tractor or tractor and trailer or other vehicular equipment, or that any employee purchase or assume any proprietary interest or other obligation in the business of the Employer.

Section 9 Blacklist

The Employer shall not establish or create a so-called "Blacklist", nor in any way become a party to the establishing of such

a "Blacklist" that may have for its purpose the prevention of any member of the Union obtaining employment with the Employer or other employers on account of such membership or Union activities.

ARTICLE 2 SHOP STEWARDS & COMMITTEE MEN

Section 1 Appointment and Duties

The Employer recognizes the right of the Union to designate two (2) Shop Stewards and two (2) Committee Men from the Employer's seniority lists. Each of the Stewards and Committee Men so designated by the Union shall represent a different department, i.e., Superthane Dept., Supercap Dept., Supertire Dept. and the Maintenance Dept. The authority of the Shop Stewards and Committee Men shall be limited to and shall not exceed the following duties and activities:

1. The investigation and presentation of grievances to the Employer or the Employer's designated representative, in accordance with the provisions of the Collective Bargaining Agreement.
2. The collection of dues when authorized by the appropriate Local Union action.

3. The transmission of such messages and information which shall originate with and are authorized by the Local Union or its officers provided such messages and information

(a) have been reduced to writing. If not reduced to writing are of a routine nature and do not involve work stoppages, slow downs or any other interference with the Employer's business.

—7—

Shop Stewards and Committee Men shall have no authority to take strike action or any other action interrupting the Employer's business. The Employer recognizes these limitations upon the authority of the Shop Stewards and Committee Men and shall not hold the Union liable for any unauthorized acts. The Employer, in so recognizing such limitations, shall have the authority to impose proper discipline, including discharge in the event the Shop Stewards or Committee Men have taken unauthorized strike action, slow downs or work stoppages in violation of this Agreement.

Section 2 Super-Seniority

Shop Stewards and Committee Men so designated by the Union shall have Super Seniority at all times within their respective departments. Super Seniority shall prevail for the following purposes:

a) Layoff.

b) Recall from layoff.

c) Bidding on higher rated jobs.

d) Job preferences.

e) Overtime.

Section 3 Orders and Decisions Not to Be Made

Shop Stewards and Committee Men shall not give orders to employees nor countermand orders of Management. Further, they shall not be the sole judge in determining whether a piece

of equipment is unsafe. However, the Business Agent shall have the right to investigate any unsafe equipment and determine, along with Management, disputes regarding any unsafe equipment.

—8—

Section 4 Investigation of Grievances

Shop Stewards and Committee Men shall be permitted to investigate, present and process grievances on the property of the Employer, within their respective departments, without loss of time or pay. Such time spent in handling grievances shall be considered working hours in computing daily and/or weekly hours worked, but all time spent in handling grievances shall be during regular working hours and in no event during overtime hours unless the Shop Steward or Committee Man is actually performing productively during overtime hours, then in that event, Shop Stewards and Committee Men shall receive their overtime hours in processing grievances. Any disputes or grievances arising within a department shall be discussed with the Chief Steward, by the Steward or the Committee Man before being processed with the Employer. If the disputes or grievances cannot be resolved between the Shop Steward or the Committee Man with the Chief Steward, then the Chief Steward and the Shop Steward or Committee Man shall discuss any such disputes or grievances with the Employer or the Employer's representative.

Section 5 Paid for Time

Whenever the Chief Steward, Steward or Committee Man is required to attend any grievance hearings with the Employer and/or with the representatives of the Union, such individual

—9—

or individuals, but no more than two (2), shall be compensated by the Employer for all regular working time lost, not including overtime, unless such individual or individuals are scheduled to

work overtime. When a Business Agent and/or the Employer agrees to a meeting to be attended by the Chief Steward, the Steward or Committee Man from the department where such disputes or grievances occur, such individual or individuals, but in no event more than two (2), shall be compensated by the Employer for all lost regular working time and not including overtime, unless such individual or individuals are scheduled to work overtime.

Section 6 Non-Discrimination

The Employer shall not, at any time, discriminate against the Chief Steward, Steward or Committee Man because of Union activities.

ARTICLE 3 ABSENCE

Section 1 Time Off for Union Activities

The Employer agrees to grant the necessary time off, without discrimination or loss of seniority and without pay, to any employee designated by the Union, in writing, to the Employer, to act as an elected Union officer, Business Agent, Organizer, or to attend a Labor Convention.

Section 2 Leave of Absence

Any employee desiring leave of absence in excess of five (5) days from his employment shall secure written permission

from both the Union and the Employer. The maximum leave of absence shall be for thirty (30) days, and may be extended for like periods. Permission for extension must be secured from both the Union and Employer.

During the period of absence, the employee shall not engage in gainful employment in any industry. Failure to comply with this provision shall result in the complete loss of seniority rights for the employee(s) involved.

Inability to work because of proven sickness or injury shall not result in the loss of seniority rights, except as elsewhere provided in this Agreement. The employee shall make suitable arrangements with the Employer for the continuation of Health and Welfare benefits, Life Insurance, and Pension benefits.

ARTICLE 4 SENIORITY PRINCIPLE

Section 1 Seniority Shall Prevail

If the Employer establishes different starting times for employees in the same job classification and on the same shift, the senior man, (the Steward shall have top seniority in this instance), if qualified in the classification, shall have the choice. For example—where the Employer schedules one employee to commence work at 7:00 a.m., another at 8:00 a.m., and a third

at 9:00 a.m., the senior employee shall have the choice of deciding which of the three he prefers. Similarly, the qualified senior man in the same job classification shall have the choice, he shall continue on that starting time until such starting time is discontinued, or until a change is mutually agreeable to the Employer and Union. Seniority shall prevail in that the Employer recognizes the general principle that senior employees within a classification (the Steward shall have top seniority in this instance), shall have preference to choose on a permanent basis, the job where the rate is highest, provided such employee is qualified for such work. Seniority shall not give the employee the right to choose a specific unit or shift, a single run, trip or load, unless otherwise mutually agreed to.

Nothing contained in this Section shall permit the Employer to discriminate against a senior employee. Seniority shall prevail on all overtime and premium days.

Section 2 Seniority Rank and Posting

Once each year, during the month of January, Employer shall compile, submit to the Union in writing, and then post in a conspicuous place separate Seniority Lists for Super Tire, Supercap, Superthane and the Maintenance Department. Any employees hired after said posting shall have their names added to these lists, in order of date of hire, and the Union shall be notified of such additions. Any controversy over the seniority standing of any employee on a Seniority List may be submitted as a grievance.

—12—

After he has worked for an Employer for at least sixty (60) consecutive calendar days, an employee shall gain seniority status and his seniority date on the seniority list shall revert to the first day of his sixty (60) day qualification period. No Employer shall be permitted to deprive a qualified employee of the right to gain seniority status by any subterfuge or by any refusal to hire such qualified employee when work is available. An employee may not be on the seniority list of more than one Employer under this agreement at the same time unless on continuous lay-off not less than two (2) years with no recall. In no event may an employee be entitled to holiday pay or vacation pay from more than one Employer at the same time.

Section 3 (a) Seasonal or Part-Time Work

With respect to any employees hired as seasonal or part-time employees, the Union shall be notified immediately in writing of such hires of any such seasonal or part-time employees. Such seasonal or part-time employees shall not have any time accrued any seniority rights or any fringe benefits, unless by mutual agreement between the Union and the Employer. In the event the Employer decides to hire full-time employees the Employer shall give seasonal or part-time employees the opportunity to become a full-time employee pro-

vided such employee is eligible for membership in the Union as of such time he becomes a full-time regular employee.

—13—

Seasonal or part-time employees shall not at any time be used while there are regular employees on lay-off. Seasonal or part-time employees shall not at any time work any over-time hours involving premium pay unless all regular employees in the department and on that shift are given first opportunity to work daily overtime and on any premium days.

(b) Protection During Revocation of License

In the event a driver should suffer a revocation of his driver's license, due to his own negligence, his job and seniority shall be protected for a period not to exceed one year. In the event the employee should suffer a revocation of his driver's license because of some violation of any laws by the Employer, the Employer shall provide suitable and continued employment for such employee at not less than his regular earnings at the time of his revocation of license for the entire period of revocation of license and the employee shall be reinstated in the seniority he held prior to the revocation of his driver's license, after his driver's license is restored.

Section 4 Loss of Seniority

Seniority shall be broken and name removed from the seniority list for the following reasons:

(a) discharge for just cause;

(b) voluntary quit; all unexplained absences for three consecutive days, which shall be deemed to constitute a voluntary quit;

—14—

(c) lay-off for two (2) years or more;

(d) failure to respond to notice of recall;

(e) unauthorized leave of absence.

Any employee who is absent because of medically certified illness or injury shall accumulate seniority for the purpose of determining his place on the seniority list, provided that habitual illness will be grounds for termination of employment. Medical certificate shall be necessary for return to duty after three (3) day absence.

Section 5 Layoff and Recall

Should it become necessary to lay employees off because of lack of business, the Employer shall resort to strict seniority on a plant-wide basis, which means the least senior employee within the plant regardless of what department he works in, shall be laid off first. When the Employer recalls laid off employees, this shall be in reverse order in the manner in which they were laid off. This means the last employee laid off shall be the first employee to be recalled.

Any employee in the plant who is laid off because of a work reduction shall have the right to bump any junior employee within the plant with no reduction in his hourly rate.

The above provision is applicable provided the employee is qualified to perform such work for which he is bumping into. In the event the Company feels that such employee is not qualified, then such employee shall have a trial period of 30 days to qualify for such job into which he is bumping.

—15—

The Superthane Department. Any employee being laid off because of a work reduction within the plant, shall have the right to bump a junior employee in the Superthane Department to prevent layoff provided such employee is in the Employer's opinion qualified to perform all duties in the Superthane Department. It is recognized that an employee bumping into the sand blasting job in the Superthane Department to prevent layoff will have express right to do so because of a limited knowledge needed for such sandblasting job.

Maintenance Department. Recognizing the abilities and skills of duties performed in the Maintenance Department, the Union hereby agrees that other employees within the plant shall not have the right to bump employees in the Maintenance Department to prevent layoff, nor shall Maintenance Department employees have the right to bump other production employees in order to prevent layoff.

(a) Notification of Recall

The Employer, when recalling laid-off employees, shall send a telegram or registered letter to the employee's last known address (as indicated on employee's records) and the employee shall have seven (7) days to respond to such recall notice. After the employee has notified the Employer that he will return to work, the employee shall have one (1) week to adjust any other personal matters he may have. If the employee fails to

report within the one (1) week period he shall lose all seniority rights under the contract.

(a) Notice of Layoff

The Employer agrees to give one (1) week's notice, whenever making seasonal or permanent layoffs, to the Union and the Shop Steward. Notice must be given in writing. Where such required notice is not given, the Employer shall pay the employees one (1) week's wages in lieu thereof.

Section 6 Military Service

In the event that any regular employee volunteers for, or is called to active military service in the Armed Forces of the United States, such employee shall not, during the period of such service, lose his seniority rights as herein provided. Upon his discharge from such service, he shall be offered his former position, or one of like status, provided he:

(a) received a certificate of honorable discharge;

(b) is still qualified to perform the duties of his position; and

(c) applied for reinstatement within ninety (90) days after such discharge.

Employees shall receive a written leave of absence from the Employer when leaving to enter into the military forces. In the event any employee covered by this Agreement, who is a reservist in the Armed Forces of the United States, is required

to go away on maneuvers or summer encampment, for a temporary period, not to exceed fifteen (15) days in any one year, the Employer agrees to supplement his military pay with an amount sufficient to equal his regular forty (40) hour weekly earnings at the straight time rate of his job classification.

(a) Jury Duty

In the event any employee covered by this Agreement is required to serve Jury Duty, the Employer agrees to supplement his Jury Duty compensation with an amount sufficient to equal his regular forty (40) hour weekly earnings at the straight time rate for his job classification.

Section 7(a) Promotions

In promoting employees to jobs coming within this Agreement, the Employer shall have the right to select qualified persons, but as between qualified persons, preference shall be given according to departmental seniority. If the Employer in his option feels that the most senior employee requesting the job is not qualified to fill such a promotion, the Employer shall grant such employee a reasonable period of time to demonstrate his qualifications for such promotion. In no event shall the Employer be required to grant such an employee more than thirty

(30) consecutive days to demonstrate his qualifications for such promotion and the Employer may remove such employee from such promotion at any time within said thirty (30) day period and the Employer shall furnish the Union with reasonable proof that the employee is not qualified. The Employer shall not be required to extend opportunity to qualify for any promotion to more than three (3) employees. This section shall not apply to promotions to supervisory capacity. Only those jobs with a premium rate in excess of first class skill rate shall be posted by the Employer.

(b) Leaving Bargaining Unit

Any employee within the Agreement who elects to become part of management shall lose all seniority rights after thirty (30) days if the employee elects to stay in management.

If the employee decides to return to the Bargaining Unit at the end of the thirty (30) days, he may do so without loss of seniority rights.

Section 8 Mergers, Consolidations, Absorptions

In the event that the Employer absorbs the business of a private company, or is a party to a merger or a consolidation, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Union and Employer.

The seniority will be discussed between the Union and Employer prior to the effective date of any merger, consolidation, or absorption, except in unusual circumstances.

In the absence of an agreement, such matter shall be submitted as a grievance, but this shall not affect takeovers or

buyouts. The seniority of employees on a takeover or buyout shall be determined by the Union and the Employer.

ARTICLE 5 MAINTENANCE OF STANDARDS

Section 1 Protection of Conditions

The Employer agrees that all conditions of the employment relating to wages, hours of work, overtime differentials, and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement; and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement. It is agreed that the provisions of this Section shall not apply to inadvertent or bona fide errors made by the Employer or the Union in applying the terms and conditions of this Agreement if such error is corrected within ninety (90) days from the date of error.

This provision does not give the Employer the right to impose or continue wages, hours, or working conditions less than those contained in this statement.

Section 2 Extra Contract Agreements

The Employer or employee shall not enter into any agreement or contract with his employees or his Employer individually or collectively which in any way conflicts with the terms and

provisions of this Agreement. Any such Agreement shall be null and void.

Section 3 Work Week Reduction

In the event that the maximum work week is reduced by legislative act to a point below the regular work week provided herein, the contract shall be reopened for wage negotiations only.

Section 4 New Equipment or Operations

Where new types of equipment and/or operations for which rates of pay are not established by this Agreement are put into use after June 25, 1971, within operations covered by this Agreement, rates governing such operations shall be subject to negotiations between the parties. Rates agreed upon or awarded shall be effective as of the date equipment or operations are put into use.

ARTICLE 6 GRIEVANCES

Section 1 Grievance Machinery

All grievances or disputes arising under the terms of this Agreement shall be handled in the manner provided by the following sections:

First Step. In the case of any such grievance or dispute, the Departmental Shop Steward or Committeeman shall take the matter up with the Employer or the Employer's representative within ten (10) working days after such grievance or dispute

becomes known and every effort shall be made to reach a mutually satisfactory solution.

The Departmental Shop Steward or Committeeman where the grievance had arisen, shall take the matter up with the Employer or Employer's representative. The Departmental Shop Steward or Committeeman may, if necessary, request the aggrieved to be present when discussing such matter with the Employer.

When a grievance has arisen and is presented to the Employer in the first step of the grievance procedure, the Employer shall within five (5) working days, give his answer to the grievance, in writing.

Second Step. If no solution can be reached, the Departmental Shop Steward or Committeeman shall refer the matter to the Business Agent, and the Business Agent may within fifteen (15) working days, take the matter up with the Employer or Employer's representative in an endeavor to adjust it amicably with the Departmental Shop Steward or Committeeman from such department where the grievance had arisen, is present.

Third Step. If the Business Agent of the Union and the Employer or Employer's representative cannot reach a mutually satisfactory solution, the grievance shall within fifteen (15) working days be submitted to the President of the Union and the Personnel Director of the Employer.

—22—

Fourth Step. Should the President of the Union and the Personnel Director fail to come to any mutual agreement on such grievance or dispute, such grievance or dispute shall be submitted to a disinterested arbitrator, who is mutually agreed upon between the Employer and the Union. In the event the Employer and the Union cannot agree on a disinterested arbitrator then the matter shall be submitted to the New Jersey State Board of Mediation Service for a selection of arbitrators; and such selection shall be by mutual agreement by the Employer and the Union.

The arbitrator shall within thirty (30) days of the closing of such hearing render a decision or decisions in such matter or matters which decision or decisions shall be final and binding on the parties.

The cost of the arbitrator shall be borne equally between the parties.

Section 2 Inspection Privileges

(a) Access to Premises

Authorized agents of the Union shall have reasonable access to the Employer's premises at any time during working hours

upon prior notice for the purpose of adjusting disputes, investigating working conditions, collection of dues, and ascertaining that the Agreement is being adhered to.

—23—

(b) Inspection of Payroll Records

Whenever a complaint is made concerning the wages, vacations and/or holidays of an employee, an authorized representative of the Union shall have the right to inspect Employer's payroll and time cards of the employee during the Grievance Procedure.

ARTICLE 7 PROTECTION OF RIGHTS

Section 1 Picket Lines

It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket line of Unions party to this Agreement, and including primary picket lines at the Employer's places of business.

ARTICLE 8 SEPARATION OF EMPLOYMENT

Upon discharge, the Employer shall pay all monies due to the employee. Upon quitting, the Employer shall pay all monies due the employee on the payday of the Employer in the week following such quitting. Upon discharge or quitting the employee shall immediately pay to the Employer all monies owed by him to the Employer and the Employer may deduct any such monies from any wages due the employee upon discharge or quitting.

ARTICLE 9 FIDELITY BONDS

Should the Employer require any employee to give bond, cash bond shall not be compulsory. Any premium involved shall be paid by the Employer. The primary obligation to secure the bond shall be on the Employer. The Employer shall have the right to require of each applicant for a job that he fill out a job application and a bond application. Should the Employer require a bond, the cost of this bond through the Employer's regular bonding company, shall be borne by the Employer.

In the case of any employee hired on or after .....,
if the Employer cannot arrange for a bond through his regular bonding company, the Employer must notify the employee and the Union, in writing, that the employee has thirty (30) days in which to secure a bond satisfactory to the Employer. During the thirty (30) days, the employee shall be afforded the opportunity of working in some non-bondable work if such work is available. If the employee secures bond satisfactory to the Employer within thirty (30) days, the standard premium only in such bonding arrangements shall be paid by the Employer. Standard premium is that premium paid by the Employer for bonds applicable to other employees of the Employer in similar classifications. Any excess premium above this standard premium is to be paid by the employee. If the employee fails to secure bond within thirty (30) days, his employment shall cease.

Should the bond of an employee hired after .....
be cancelled, the employee shall be suspended, without pay. During the next thirty (30) days, the employee will be given the

opportunity to secure a bond satisfactory to Employer. If the employee secures bond satisfactory to Employer within thirty (30) days, employee shall be returned to his job with seniority rights restored. If the employee secures such bond, the standard

premium only, in such bonding arrangements, shall be paid by the Employer. Any excess premium above standard premium is to be paid by employee. If the employee fails to secure bond satisfactory to Employer within thirty (30) days, his employment with Employer shall be considered as having been terminated as of the date of the cancellation of the bond.

Article 10 Compensation and Insurance

Section 1 Compensation Claims

The Employer agrees to cooperate towards the prompt settlement of employees on-the-job injury claims when such claims are due and owing.

Section 2

The Employer shall provide employees with Workmen's Compensation Insurance, social security, temporary disability insurance, and unemployment insurance, as required by Federal and State law.

Article 11 Conditions of Work Safety

Under no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions of work, or danger to person or property, or in violation of any applicable statute or court order, or in violation of a government regulation relating to safety of person or equipment. The term "dangerous condition of work" does not relate to the type of cargo which is hauled or handled.

The Employer further agrees to cooperate to the fullest extent possible in all safety campaigns or projects in which the Union may see fit to take official part. At least twice each year of this Agreement the Employer will make available instructions in

safety and first aid for his employees. The Employer and the Union will discuss arrangements for same.

Upon completion of this contract, the Union and the Employer shall meet and make arrangements for a safety committee comprising of two (2) representatives from the Employer and two (2) representatives from the Union; namely, employees, to establish rules and regulations.

Article 12 Reports of Defective Equipment

Employees shall immediately, or at the end of their shift, report all defects in equipment. Such reports shall be made on a suitable form furnished by the Employer and shall be made in multiple copies, one (1) copy to be retained by the employee. The Employer shall not ask or require any employee to take out equipment that has been reported by another employee as being in an unsafe operating condition until same has been approved as being safe by management or the mechanical department.

When the occasion arises where an employee gives written report on forms in use by the Employer of a vehicle being in an unsafe working operating condition, and receives no consideration from the Employer, he shall take the matter up with the Union.

No employee shall be required to pay for loss or damage unless it shall first be proven that such loss or damage was caused by the employee's negligence or improper act and not by that of the Employer. No deduction shall be made from any

employee's pay at any time for any loss or damage to equipment. All matters arising under this paragraph shall be first disposed of between the Union and the Employer before any penalty be imposed and a warning letter shall be the prescribed penalty for a first offense. All employees will be held responsible for the proper care and maintenance of their equipment and the facilities. Any willful neglect on the part of the em-

ployee or any act performed in defacing equipment or facilities will be subject to disciplinary action. Tools may be assigned to employees and employees held responsible for them.

Article 13 Accidents and Reports

Section 1 Reporting Accidents

Any employee involved in an accident shall immediately report said accident and any physical injuries sustained. When required by the Employer, the employee, before going off duty and before starting his next shift, shall make out an accident report in writing on company time, on forms furnished by the Employer, and shall turn in all available names and addresses of witnesses to the accident.

Section 2 Injury on the Job

(a) Any employee sustaining injuries which are compensable under the Workmen's Compensation Act, but which do not prevent him from performing his usual duties, but require that he visit the offices of Employer-designated physicians for the purpose of obtaining further treatment during working hours, shall suffer no loss of wages because of such visits.

(b) Any employee sustaining injuries which are compensable under the Workmen's Compensation Act which prevent him from performing all work available to him, at Employer's place, shall sustain no loss of pay for the balance of the day on which he was injured. Ability to perform work shall be determined by doctor and/or hospital report.

Article 14 Meal Periods

Section 1 Lunch Period

All employees shall receive a lunch period at the end of the fourth hour of work. The lunch period shall be one-half (½) hour. Any employee required to work during more than fifteen minutes after the start of his lunch period shall receive time and one-half for such lunch period, and may not be dismissed one-half hour earlier, but shall work the necessary hours whereby producing one-half hour overtime at the end of his working day.

Any employee who is required to work through his lunch period, as stated above, shall be afforded a twenty-minute break period to eat his lunch, on Company time, after the fourth hour and not later than the fifth hour.

—29—

Section 2 Supper Period

Any employee required to work in excess of two (2) hours overtime in any one (1) day shall be afforded a twenty (20) minute break period on Company time.

Article 15 Discharge or Suspension

Section 1 Cause for Dismissal or Suspension

No employee may be dismissed or suspended without just cause. Nothing shall prohibit the Union from investigating any dismissal or suspension and resorting to the Grievance Procedure provided in this Agreement.

Until the case has been discussed with the Business Agent, no employee may be dismissed or suspended except where the provisions of this Section provide for immediate dismissal.

In the event that it is decided, as provided in the Grievance Procedure set forth in this Agreement, that the suspension or

discharge was without just cause, the decision shall provide for reinstatement with or without back pay. If the decision directs reinstatement with pay, the Employer shall not receive any credits for wages or compensation earned by the employee while he was out of the Employer's employ. Except where an emergency prevents it, grievances concerning dismissal or suspension shall be advanced over all other matters pending for grievance

hearings, and shall be promptly heard. Except in the case of immediate dismissal for the causes set forth below, no employee may be dismissed or suspended for his first offense, but shall receive at least one written warning. Warning notice for absence or lateness must be given within five (5) work days; warning notice for all other violations must be given within three (3) work days following day of violation. The parties agree that causes for dismissal without first discussing the matter with the Business Agent shall be the following:

(1) Calling or participating in any unauthorized strike, work stoppage, or walk-out.

(2) Drunkenness, proven drinking during working hours, or being under the influence of alcohol or unlawful narcotics during working hours.

(3) Theft or dishonesty.

(4) Assault on his Employer or his Employer's representative during working hours.

(5) Carrying unauthorized passengers in Employer's vehicle.

(6) Assault by an employee against his fellow workers during working hours.

(7) Deliberate vandalism or defacing Company property and equipment, or, in this case, in lieu of discharge, financial action may be taken against the employee.

—31—

In each instance, the Employer shall promptly notify the Union of the action taken, in writing, promptly upon such action.

The parties agree that a dismissal or suspension shall not be subject to the Grievance Procedure or arbitration as provided in this Agreement unless the Union shall have notified the Employer in writing of the intention to do so within two (2) weeks of the dismissal or suspension. The parties recognize that in interpreting previous agreements there have been difficulties over whether or not the Employer may dismiss employees for slow-downs. The parties agree that this matter is cause for discharge.

Section 2 Warning Notices

Warning notices shall not remain in effect for a period of more than six (6) months from the date of such warning notice. An employee shall not be suspended until the Local Union has been given forty-eight (48) hours written notice. Saturdays, Sundays and Holidays shall be excluded in determining the forty-eight (48) hour period.

ARTICLE 16 DISCRIMINATION

There shall be no discrimination by the Employer against his employees because of Union activities; nor shall there be any discrimination against any employee because of race, color, creed, sex, age, or nationality, in the placement and retention of employment, or in the hours, wages or working conditions of the employees.

—32—

ARTICLE 17 SUBCONTRACTING

The Employer agrees that it will not cease or refrain from handling, using, transporting or otherwise delivering any products

of any other employer or cease doing business with any other person, or wherein any other obligation imposed by the Motor Carrier's Act or other applicable law as a result of an individual employee exercising their rights under this agreement or under the law, but the Employer shall not withstanding any other provision in this agreement, when necessary, continue doing business by other employees. For the purpose of preserving and protecting work and job opportunities under this agreement, and for the duration of this agreement, the Employer agrees that it will not subcontract, transfer, lease, assign or convey, in whole or part, any work presently being performed under this contract, work to any other plant, division, or any other operations within the department covered by this agreement, or to non-unit employees, unless all regular full-time employees in a department are given work opportunities including any and all laid off employees. In the event the Employer subcontracts out work from any department and subsequently thereafter employees are laid off from any department because of such subcontracting of work, then the employer shall return such work to the department affected to prevent layoff of employees.

—33—

Article 18 Work in Other Classifications

Employees who are required to work in more than one job classification during their working hours of any day shall be paid for that entire day at the rate of the highest job classification worked.

Article 19 Work Assignments

Except as to past practice, the Employer shall not direct, require or permit employees other than the employees within the bargaining unit here involved to perform work which is recognized as the work of the employees falling within the scope of this Agreement, or direct, require or permit employees who are covered within this Agreement to perform work which does not fall within the scope of this Agreement.

Article 20 Paid for Time

Section 1 General

All employees covered by this Agreement shall be paid for all time spent in the service of the Employer.

Section 2 Break Periods

All employees shall receive a ten (10) minute break period in the a.m., and a ten (10) minute break period in the p.m., without loss of pay.

Section 3 Death in Family

In the event of a death in an employee's immediate family (which consists of parents, wife, husband, children, brothers, sisters, mother-in-law, father-in-law or grandparents) the employee shall be allowed three (3) days leave with three (3)

days straight time pay, provided that he shall receive no pay unless the day of burial falls on a regular work day and not on days off, holidays, vacations, Saturdays or Sundays.

Section 4 Holidays

The parties recognize the following holidays:

New Year's Day	Fourth of July	Day after Thanksgiving
Good Friday	Labor Day	Christmas Eve Day
Decoration Day	Thanksgiving Day	Christmas Day
	New Year's Eve Day	

New Year's Eve Day

Effective May 15, 1972, each employee shall be granted one personal holiday, in addition to the foregoing holidays, each subsequent year of this Agreement. This personal holiday shall

be taken at the employee's discretion, upon at least two (2) weeks' notice to the Employer, with the Company's approval. The Employer shall have the right to limit the number of employees taking a personal holiday at any one time.

A. Seasonal or part-time employees shall not be eligible for holiday pay.

B. Any holidays under this Agreement falling on Saturday shall be celebrated on the preceding day Friday.

C. Any holidays covered under this Agreement falling on Sunday shall be celebrated on the following Monday.

D. All employees absent from work due to a medically certified legitimate illness or injury shall be entitled to all holidays covered under this Agreement.

—35—

E. Any employee on the seniority list who does not work on any of the holidays stipulated in this Agreement shall receive his regular wage rate for the holiday.

F. In order to be eligible for a holiday with pay an employee must work the scheduled full work day preceding the holiday and the scheduled full work day following the holiday.

Section 5 Sick Leave

The Company shall allow five (5) days sick leave per year per employee, with pay, for legitimate, medically certified illness or injury after the employee is absent five (5) working days.

For example, if a man is sick six (6) consecutive days, Employer would pay for one (1); seven (7) consecutive days, Employer would pay for two (2); eight (8) consecutive days, Employer would pay for three (3); nine (9) consecutive days, Employer would pay for four (4); the (10) consecutive days, Employer would pay for five (5).

Section 6 Time Studies

The Employer may conduct time studies and require daily work sheet reports to maintain efficient operation and to enable the Employer to establish incentive programs in certain areas where such incentives could further reward employees with increased earnings.

ARTICLE 21 VACATIONS

Vacations shall be computed from the anniversary date of employment from year to year. Employees continuously in the service of the Employer for one (1) year shall be entitled to one (1) week's vacation, with pay.

Employees continuously in the service of the Employer for two (2) years shall be entitled to two (2) weeks' vacation, with pay.

Employees continuously in the service of the Employer for ten (10) or more years shall be entitled to three (3) weeks' vacation, with pay.

Employees continuously in the service of the Employer for fifteen (15) years or more shall be entitled to four (4) weeks' vacation, with pay.

Employees continuously in the service of the Employer for twenty-two (22) or more years shall be entitled to five (5) weeks' vacation, with pay.

In a vacation week in which one of the holidays named occurs, an employee on vacation shall receive an extra day's pay for eight (8) hours at his or her straight time rate for the holiday.

ARTICLE 22 REOPENING EMERGENCY

In the event of Congressionally declared war or imposition of economic controls during the life of this Agreement, either

party may re-open same upon sixty (60) days written notice and request re-negotiations of matters dealing with wages and hours.

—37—

Upon the failure of the parties to agree in such negotiations, either party shall be permitted all lawful economic recourse to support their request for revisions. If governmental approval of revisions should become necessary, all parties will cooperate to the utmost to attain such approval. The parties agree that the notice provided herein shall be accepted by all parties as compliance with the notice requirements of applicable law, so as to permit economic action at the expiration thereof.

Article 23 Check-off of Dues

Upon receipt of proper written authorization of any employee, the Employer will deduct from the wages due such employee, on the first pay week of each month, his Union initiation fees and monthly dues, as are from time to time fixed by the local Union, in accordance with the Constitution and By-Laws of the Local Union, and certified to the Employer by the Secretary-Treasurer of the Local Union as being so fixed, and will forward the aggregate amount of such deductions promptly each month to the Secretary-Treasurer of the Union or other duly authorized representative designated by the Union.

When an employee who is on check-off is not on the payroll during the week which the deduction is to be made or who has

—38—

no earnings or insufficient earnings during that week or is on leave of absence, the employee must make arrangements with the Union to pay such dues in advance. The Employer will recognize authorization for deductions from wages, if in compliance with State law, to be transmitted to the Union or to such other organizations as the Union may request if mutually

agreed to. No such authorization shall be recognized if in violation of State or Federal law. No deduction shall be made which is prohibited by applicable law.

Article 23A Check-off of Drive

With the consent of any employee, the Employer will deduct from the employee's pay the sum of Five Dollars ($5.00) per year, effective at such time the employee signs an authorization card.

Article 24 Wages and Hours

Section 1 General

The Union agrees that the Employer shall be entitled to "a day's work for a day's pay."

The regular work week shall consist of five (5) days of eight (8) hours each, exclusive of the meal period, Monday through Friday.

Any employee who is called in to work, except as elsewhere provided, or who starts to work on any day, shall be paid for a full day's work at eight (8) hours; provided that if the Union supplies help not having experience in the particular type of work for which supplied, and such help shall prove unsatisfactory

after less than eight (8) hours of work, Employer shall be obligated to pay such employee only for the time actually worked.

Section 2 Pay Period

All regular employees covered under this Agreement shall be paid in full each week. Not more than one week's pay shall be held on an employee. Where less than one week's pay is now held, Employer may not increase the amount held until the change has been discussed with the Union. All other employees shall be paid at the end of their working period.

Section 3 Pay Day

When the regular pay day occurs on a holiday, the Employer shall pay the employees on the regular work day immediately preceding the holiday.

Section 4 Statement of Earnings

Each employee shall be provided the statement of gross earnings, and an itemized statement of all deductions made for any purpose.

Section 5 Wages—Shift Differential

All employees working the second shift shall receive a shift differential of 12¢ per hour.

All employees working the third shift shall receive a shift differential of 18¢ per hour.

—40—

Section 5(a) Lie Detector Test

The Company shall not require, request or suggest that an employee take a polygraph or any other form of lie detector test, unless by voluntary consent and notification to the Business Agent.

Section 6 Wages

	6/25/71	5/15/72	5/15/73
Recappers:			
Starting Rate	$2.60	$2.70	$2.80
2nd Class (after 60 days in starting rate)	2.80	2.90	3.00
1st Class (after 120 days in 2nd Class)	3.50	3.70	3.90
Working Leader	3.70	3.90	4.10

Road Servicemen-Servicemen-Truck Drivers:			
Starting Rate	2.60	2.70	2.80
2nd Class (after 60 days in starting rate)	2.80	2.90	3.00
1st Class (after 120 days in 2nd Class)	3.50	3.70	3.90
Working Leader	3.70	3.90	4.10
Tractor Trailer Driver	3.60	3.80	4.00
Straight Truck Driver away overnight or going to a destination 60 miles from Pennsauken Plant.			
Maintenance Men:			
Apprentice Trainee	2.60	2.70	2.80
3rd Class Skills	2.90	3.00	3.10
2nd Class Skills	3.35	3.45	3.55
1st Class Skills	3.76	3.96	4.16
Working Leader	3.96	4.16	4.36

Employees with five (5) years of service as of May 14, 1971, will receive an additional 5¢ per hour. This does not apply to any employees accumulating five (5) years of service subsequent to May 14, 1971.

The two shop stewards shall be paid at floor leader's rate of pay applicable in the department in which they work. This does not apply to Committeemen.

—41—

Section 7 Overtime

The work shall consist of five (5) days of eight (8) hours each, Monday through Friday.

For all hours worked on Saturday, an employee shall be paid at the rate of one and one-half (1½) times the rate for the

job. The Employer guarantees six (6) hours on Saturdays, Sundays and holidays to employees called in to work, provided that if an employee voluntarily works less, he will be paid for what he actually works.

Further, if an employee who is called in to work on a Saturday, Sunday or holidays, fails to report for work at the scheduled starting time or fails to call his superior at least one (1) hour prior to the scheduled starting time informing him of his unavailability, such failure to report or call shall constitute an unexcused absence. For all hours worked on Sunday, an employee shall be paid at the rate of two (2) times the rate for the job. For all hours worked on holidays, an employee shall be paid at the rate of two (2) times the rate for the job in addition to the holiday pay.

For all hours worked in excess of eight (8) in a day an employee shall be paid at one and one-half (1½) times the rate for the job. For all hours worked in excess of thirty-two

(32) in a week when a holiday occurs, an employee shall be paid at one and one-half times the rate for the job.

Except as otherwise specifically provided elsewhere in this Agreement, no employees shall be entitled to receive overtime pay, except for overtime actually worked.

An employee will be paid for the day at the highest rate of pay in classification worked.

Section 8 Shifts Ending on Holidays or Weekends

Employees who are assigned to work on their regular shift, on an evening prior to a holiday, and whose work ends on the holiday, shall work the hours necessary to complete that day's work at the regular rate. All hours worked in excess of eight (8) hours will be at the holiday rate. Employees who are assigned to work on their regular shift on a Saturday evening,

and whose work ends on Sunday, shall work the hours necessary to complete that day's work at the Saturday rate. All hours worked in excess of eight (8) hours will be at the Sunday rate. Any employee required to work in excess of eight (8) hours

—43—

in any day, Monday through Friday or in excess of forty (40) hours per week shall receive time and one-half.

Article 25 Management Security

The Union recognizes that the Employer covered by this Agreement must compete and keep abreast of developments in methods of distribution, and must operate efficiently and economically, if he is to be able to meet rising costs of operation, including rates of pay and working conditions to members of the Union. Accordingly, the Union agrees that it will cooperate with the Employer to the end that his business may be operated efficiently, and further agrees that it will not interfere in any way with the Employer's right to operate and manage his business, provided that nothing herein will permit the Employer to violate any of the terms and/or conditions of this Agreement.

If the Steward or employees feel that the Employer in any way violates this Agreement, the matter shall be handled in the manner outlined by the Grievance Procedure in this Agreement.

—44—

Article 26

(a) Savings and Separability Clause

The parties to the Agreement believe it complies with the Labor-Management Act of 1947. Accordingly, it is agreed that nothing contained in this Agreement shall require Union

or Employer to do anything which violates the law. The parties agree that all of the clauses of this Agreement shall be severable. Any clause which may be prohibited by, invalid under, or in contravention of any operable Federal or State law, or under which Employer or Union is required to do any act which is in contravention of any Federal or State law, shall be null and void, but in such event the remaining clauses shall continue in full force and effect for the terms of this Agreement, and any renewal thereof.

The parties agree, in good faith, to attempt to replace any such null and void clause with a clause which conforms with the law.

The parties further agree that if during the term of this Agreement or any renewal thereof any such null and void clause shall become legal or permissible by legislative enactment, a subsequent decision of the courts or otherwise, such null and void clause shall again become part of this Agreement.

Any disagreement shall be submitted to the Grievance Procedure.

(b) Terms and Provisions Binding

The Employer and Union who are party to this Agreement agree to be bound by all of the terms and provisions of the

Agreement, and the interpretations and enforcement thereof, and do further agree to participate in negotiations of any modification or renewal of the contract.

ARTICLE 27 GENERAL

Section 1 Posting of Notices

The Employer agrees to the posting, within his business premises, of notices of Union meetings, etc.

Section 2 Wage Executions

In the event of notice to the Employer of a garnishment or impending garnishment the Employer may take disciplinary action, in accordance with past practice, to the extent permitted by Title III of the Federal Consumer Credit Protection Act and the laws of the State of New Jersey.

Section 3 Company Rules

Employer may establish such rules as he deems necessary or desirable provided that such rules are not in conflict with the terms and provisions of this Agreement. A copy of such rules shall be sent promptly to the Union and will become effective only if mutually agreed to by the Employer and the Union. However, Company rules in effect at the time of this Agreement, whether or not reduced to writing, shall continue in effect unless inconsistent with this Agreement.

—46—

Section 4 Uniforms and Safety Shoes

Employer agrees that if any employee is required to wear any kind of uniform as a condition of his continued employment, such uniform shall be furnished by the Employer, free of charge but subject to a nominal deposit, at the standard required by the Employer. No employee shall be required to wear any uniform which does not bear the Union label. Once each year, on the anniversary date of the employee's employment, the Employer shall pay to the employee upon request the sum of $15.00 as annual allowance for the purchase of safety shoes.

Section 5 Sanitary Conditions

The Employer shall provide suitable sanitary conditions for his employees, such as toilets, and hot and cold running water.

Section 6 Mutual Guarantees

When Employer and Union shall have agreed in writing upon interpretations of this Agreement or uniform rules and regulations for the conduct of employees, such interpretations or rules and regulations shall be regarded as a part of this Agreement.

—47—

ARTICLE 28 HOSPITALIZATION AND LIFE INSURANCE

Section 1

The Employer will provide a major medical program with the following features:

Major Medical

With $20,000 Maximum Per Individual

Hospital:	Pays first $3,000 in full and 80% of any additional amount.
	Includes charges for room and board (semi-private), operating room, drugs, x-rays, laboratory tests, anesthetics, local ambulance, emergency out patient care, etc.
Surgical:	Up to $600 according to schedule (any charges in excess of schedule are included with other eligible expenses) per 24-hour period.
Hospital-Medical:	$5 per day from the first day through the 120th day.
	Any charges in excess of the above included as an eligible expense under major medical.
Maternity:	$600 maximum for normal delivery. (Complicated deliveries are eligible for $3,000, 80% etc.)

X-Ray & Lab Out of Hospital:	Up to $75 per year on a scheduled basis (any charges in excess of the above are included with other eligible charges).
Other Eligible Charges:	Pays 80% up to $20,000 total after $100 deductible per person, per year (maximum of two deductibles per family for all illnesses and accidents; one deductible per family for same accident).
Private Duty Nursing Care:	Included as eligible expense.
Physiotherapy:	Included as eligible expense.
Drugs & Medicines Outside Hospital:	Included as eligible expense.

Other Medical Equipment such as artificial limbs, eyes, wheelchair, etc.:	Included as eligible expense.
Radiation Therapy:	Included as eligible expense or covered under hospitalization if charged by hospital.
Radium Therapy:	Included as eligible expense or covered under hospitalization if charged by hospital.
Exclusions:	Governmental care. Charges incurred due to an act of war while insured. Cosmetic surgery unless for an accident while insured. Examination for glasses or hearing aid. Most dental treatment except that due to accident. Doctors charges for certain foot conditions. Occupational injuries or disease covered by Workmen's Compensation.

Medical Benefit

As a separate benefit, the plan will provide, in addition to the basic plan, benefits for doctor's calls as follows:

a. Total disability is not required.
b. Benefits will begin on the fourth call, whether for accident or sickness disability.
c. Employees and all eligible dependents will be covered.
d. A separate series of calls begins when any two consecutive calls are separated by more than twenty (20) days.
e. Benefit level:
   $6.00 for Home or Hospital visits
   $4.00 for Office visits
   Limit of 70 calls per year; i.e., $280.00 to $420.00 in benefits.

—49—

Section 2

Employer shall provide and pay for a Six Thousand Dollar ($6,000) Life Insurance Policy, with Double Indemnity, for each employee covered under this Agreement.

ARTICLE 29 PENSION PLAN

All regular full-time employees become a member after one (1) year of service.

All regular full-time employees with one (1) year of service on January 1, 1962, automatically became participants under the Plan.

The Employer pays the entire cost of all benefits provided under the Plan.

Employee may retire on what is called the Normal Retirement Date which shall mean the first day of January following his 65th birthday or ten (10) years after the effective date (January 1, 1962) whichever occurs later. The retirement

of an employee, however, may be deferred from year to year for one year at a time at the request of the employee and with the approval of the Employer.

An employee having attained age 55, but not age 65, and having twenty (20) or more years of Continuous Service may, upon approval of the Employer, retire on the first of January thereafter. However, if he retires early, his pension will be reduced, because it will begin at a younger age and will be payable for a longer period.

If an employee retires on or after his Normal Retirement Date and has completed ten (10) years or more of Continuous Service, he shall, upon application, be entitled to receive a

monthly benefit equal to $4.00 times the years of Credited Service accumulated to his Normal Retirement Date. Credited Service used in calculating benefits hereunder shall be computed on the basis of full years only and any fractional year in excess of the total number of full years shall be ignored.

In the event an employee's retirement is deferred on a year-to-year basis, the funds accumulated to provide his retirement benefit shall at Normal Retirement Date be set aside at interest (with a rate of 2% per annum guarantee) until his actual retirement or sooner death. At such time the said funds will be used to provide whatever increased retirement benefit such amount of money may then purchase or if the employee has died the said funds will be paid over to his beneficiary. An employee whose retirement is deferred will not accumulate credited service beyond his Normal Retirement Date. If an employee satisfies the requirements as stated, he may, upon approval by the Employer, retire on the first of January thereafter. He would receive an immediate pension equal to the normal retirement benefit reduced by 4/10 of 1% for each month that the early retirement date precedes Normal Retirement Date.

If, after having completed five (5) or more years of Continuous Service, an employee becomes totally and permanently disabled for a period of twenty-six (26) consecutive weeks, he shall be eligible for a disability retirement pension commencing

on the first of the month following the determination of such disability.

An employee shall be deemed to be totally and permanently disabled when sufficient medical evidence indicates that he is totally and permanently prevented from engaging in any position available with the Employer as a result of bodily injury or disease except such employment as is for the purpose of rehabilitation. An employee shall not be deemed disabled if it is determined that his incapacity consists of chronic alcoholism or addiction to narcotics or that such incapacity was connected, suffered or occurred while he was engaged in felonious enterprise or resulted from an intentionally inflicted injury or resulted from service in the Armed Forces of any country for which a service connected disability benefit is possible. Any disability pensioner prior to age 65 may be required to submit to medical examination at any time but not more often than six-month intervals to determine whether he is eligible for continuance of the disability pension. In the event the employee fails within thirty (30) days after notice to submit to medical examination, his pension shall be discontinued until he submits to examination.

The monthly pension for any employee who shall retire on a disability pension shall be whatever benefits are obtainable from the application of the funds accumulated through December 31st of the preceding year plus interest thereof at the rate

of 2% per annum from January 1st of the preceding year plus interest thereof at the rate of 2% per annum from January 1st of the year of retirement to actual retirement date.

If an employee terminates his employment with the Employer after having attained age 30 and having completed five (5) or more years of Continuous Service for reasons other than retirement, death or permanent and total disability he shall, if such termination is caused by his inability to meet the requirements of his position with the Employer and to qualify for transfer to any other available position with the Employer (and not otherwise) be entitled to a severance benefit commencing on his Normal Retirement Date and calculated as follows:

Such deferred benefit as may then be obtainable by the application of the following percentages of the funds accumulated through December 31st of the year preceding such termination (including contributions by the Employer with respect to such year):

Number of Years of Continuous Service	Percentage of Pension Vested
0—4th year	0%
5th—10th year	2%— 12%
11th—15th year	14½%—24½%
16th—40th year	27½%—99½%
41st year	100%
42nd and later years	100%

Notwithstanding the foregoing, any employee who shall have attained age fifty-five (55) and shall have completed twenty

(20) or more years of continuous service, shall be entitled upon termination of employment for any reason other than proven dishonesty or disloyalty or employment by a competitor to receive the same benefit to which he would be entitled under Early Retirement, had he been permitted early retirement, but in the event of such termination he shall receive his benefit commencing at Normal Retirement Date and shall not be entitled to receive an immediate benefit.

If retirement occurs on the Normal Retirement Date, the first

monthly payment of the retired employee's retirement benefit shall be payable as of the Normal Retirement Date except as provided for deferred benefits in case of early retirement or severance, if retirement is at a date other than at the Normal Retirement Date, the first monthly payment shall be as of the day on which the employee actually retires hereunder. Thereafter the benefit shall be payable as of the first day of the month during his life. The normal benefit provided under this plan is a monthly annuity for life and without refund. However, an employee, prior to his actual retirement via normal retirement, deferred retirement, early retirement or disability retirement or severance, may elect:

(a) to receive a lump-sum payment.

(b) to receive a reduced pension payable during his lifetime with provision for payment over a certain and continuous period of ten (10) fifteen (15) or twenty (20) years to himself or surviving beneficiary.

—54—

(c) for continuation of ½, ⅔ or the full amount of such reduced pension (as the employee shall elect) after his death and during the lifetime of his spouse. The amount of such pension shall be the actuarial equivalent of the pension as applicable and shall be calculated in accordance with actuarial tables recommended by the actuaries and approved by the Personnel Department.

The retirement benefit of any retired employee shall cease as of the date of return if the retired employee is reemployed by the Employer and shall resume as of the first of the month of his subsequent retirement and retirement benefit payable upon such subsequent retirement shall be on the basis of his aggregate credited service at the time of his subsequent retirement.

Article 30 Part-Time Employees

The employment of students as part-time help will not be used to deprive regular employees of overtime. School students must pay an initial fee of Twenty-five Dollars ($25.00) after

the completion of thirty (30) days of employment plus monthly dues. If students are employed beyond September 15, they will be required to pay the additional $25.00 initiation fee.

No fringe benefits will be paid part-time, casual or seasonal employees.

Article 31 Christmas Bonus

All employees will be paid a Christmas bonus on or about December 15, to be computed on the basis of Five Dollars

($5.00) per year of service completed on the immediately preceding December 1.

Article 32 Working Leaders

Working leaders who do not successfully perform their duties of directing work and men shall be liable to reduction of status to the rank which they would otherwise hold, at the pay scale of the reduced rank.

Article 33 Maintenance Department

The Employer and the Union agree:

(1) Tools—Maintenance men shall provide all basic hand tools. The Employer will replace all broken or worn-out tools, when turned in by employees.

(2) Posting of Jobs—Only those jobs paying premium rate in excess of first class skill rate will be posted by the Employer.

(3) Maintenance men entering or leaving Company Shop area who are carrying tools will be allowed the nearest entrance or exit to work shop area.

(4) The Employer will provide first aid chest and oxygen in Maintenance Shop.

(5) The Employer shall provide adequate work space in Maintenance Shop well lighted and ventilated.

(6) The Company shall not change regular starting times unless there is a 48 hour notice to the regular change. Saturdays and Sundays are excluded. When changing regular shifts the Company shall notify the employees one week before the change is put into effect. Emergencies excepted.

ARTICLE 34 TERM OF AGREEMENT

This Agreement shall be in full force and effect from June 25, 1971, and shall remain in effect until and including June 14, 1974, and shall continue in force from year to year there-

after unless and until either of the parties hereto shall give to the other party sixty (60) days written notice prior to the end of the original term in 1974, or sixty (60) days written notice prior to the end of any subsequent year, of an intention to terminate at the end of the original term or of the then current year. In the event of an inadvertent failure by either party to give the notice set forth herein, such party may give such notice at any time prior to the termination or automatic renewal date of this Agreement. If a notice is given in accordance with the provisions of this Section, the expiration date of this Agreement shall be the sixty-first (61st) day following such notice.

In Witness Whereof, the parties hereto have set their hands and seals this 25th day of June, 1971.

For the Employer:

Super Tire Engineering Company
By /s/ Illegible

Supercap Corporation
By /s/ Illegible

For The Union:
/s/ John P. Greeley,
John P. Greeley,
President

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 19 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ,

Petitioners,

v.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION NO. 676, Affiliated With International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Of Counsel:

STRADLEY, RONON STEVENS & YOUNG,
1300 Two Girard Plaza,
Philadelphia, Pa. 19102

LEDERER, FOX AND GROVE,
111 West Washington Street,
Chicago, Illinois. 60602

HERBERT G. KEENE, JR.,
1300 Two Girard Plaza,
Philadelphia, Pa. 19102

LAWRENCE M. COHEN,
111 West Washington Street,
Chicago, Illinois. 60602

Attorneys for Petitioners.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
A. The Decision Below Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court	5
B. The Decision Below Directly Conflicts With the Decisions of the First Circuit and Other Federal Courts	9
C. This Court Should Determine Whether State Welfare Assistance Improperly Infringes Upon the Federal Labor Policy of Free Collective Bargaining	10
CONCLUSION	14
APPENDIX:	
Court of Appeals Opinion	A1
Court of Appeals Judgment	A29
Court of Appeals Order Granting Amicus Status to United States Chamber of Commerce	A31
Court of Appeals Order Denying Appellants' Petition for Rehearing	A32
Court of Appeals Order Denying Petition for Rehearing of United States Chamber of Commerce	A33
Supreme Court Order Extending Time to File Petition for Writ of Certiorari	A34
District Court Oral Opinion	A35
District Court Order Denying Motion for Preliminary Injunction and Dismissing Action	A37
Statutes Involved	A39

TABLE OF CASES CITED.

	Page
Aeronautical Lodge 727 v. Campbell, 337 U. S. 521 (1949) ..	8
Almacs, Inc. v. Hackett, 312 F. Supp. 964 (D. R. I. 1970) ..	8, 9, 11
Atlantic Richfield Co. v. Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO, 447 F. 2d 945 (7th Cir., 1971)	6
Avco Corp. v. Local 787, UAW, 459 F. 2d 968 (3rd Cir. 1972)	6
Carroll v. President and Commissioners of Princess Anne County, 393 U. S. 175 (1968)	6
Dandridge v. Williams, 397 U. S. 471 (1970)	11
Division 1287, Bus Employees v. Missouri, 374 U. S. 74 (1963)	7
Francis v. Davidson, 340 F. Supp. 351 (D. Md.), aff'd per curiam, 409 U. S. 904 (1972)	9, 11
Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275 (1946)	8
General Dynamics Corp. v. Local 5, Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO, 469 F. 2d 848 (1st Cir. 1972)	6
Gray v. Sanders, 372 U. S. 368 (1963)	6
Grinnell Corp. v. Hackett, — F. 2d —, 82 LRRM 2986 (1st Cir. 1973)	8, 9, 10, 11, 12
ITT Lamp Division v. Minter, 435 F. 2d 989 (1970), cert. den., 402 U. S. 933, reh. den., 404 U. S. 874 (1971)	4, 9, 10, 11, 12
Johnson v. New York State Education Department, — U. S. —, 34 L. Ed. 2d 290 (1972)	6
Lascaris v. Wyman, 82 LRRM 2634 (1972)	9, 11
Liner v. Jafco, Inc., 375 U. S. 301 (1964)	13
Local No. 8-6, Oil, Chemical and Atomic Workers Int'l Union, AFL-CIO v. Missouri, 361 U. S. 363 (1960)	3, 7
Local 1976, Carpenters v. N. L. R. B., 357 U. S. 93 (1958) ..	6
Moore v. Ogilvie, 394 U. S. 814 (1969)	6
Motor Coach Employees v. Lockridge, 403 U. S. 274 (1971)	13

TABLE OF CASES CITED (Continued).

Page

N. L. R. B. v. Globe Wernicke Systems Company, 336 F. 2d 589 (6th Cir. 1964) 6

N. L. R. B. v. Local 825 Operating Engineers, 400 U. S. 297 (1970) 6

N. L. R. B. v. Marsh Supermarkets, Inc., 327 F. 2d 109 (7th Cir. 1963) 6, 7

N. L. R. B. v. Mexia Textile Mills, 339 U. S. 563 (1958) 6

N. L. R. B. v. Newark Morning Ledger, 120 F. 2d 262 (3rd Cir.), cert. den., 314 U. S. 693 (1941) 8

N. L. R. B. v. Plumbers Union of Nassau County, Local 457, 299 F. 2d 497 (2nd Cir. 1962) 6

N. L. R. B. v. Raytheon Company, 398 U. S. 25 (1970) 6, 7

N. L. R. B. v. United Hatters, 286 F. 2d 950 (4th Cir. 1961) 6

Pacific Maritime Ass'n v. Longshoremen, 454 F. 2d 262 (9th Cir. 1971) 6

Roe v. Wade, — U. S. —, 35 L. Ed. 2d 147 (1973) 6

Russo v. Kirby, 453 F. 2d 548 (2nd Cir. 1971) 11

Sibron v. New York, 392 U. S. 40 (1968) 6

Solien v. Miscellaneous Drivers and Helpers Union, Local No. 610, 440 F. 2d 124 (8th Cir. 1971) 10

Southern Pacific Terminal Co. v. I. C. C., 219 U. S. 498 (1911) 6, 9

The Dow Chemical Co. v. Taylor, 57 FRD 105 (E. D. Mich. 1972) 11, 12

United States v. Concentrated Phosphate Export Ass'n, Inc., 393 U. S. 199 (1968) 6

United States v. W. T. Grant Co., 345 U. S. 629 (1953) 6, 10

STATUTES CITED.

	Page
Federal Rules of Civil Procedure, Rule 12(b)(6)	12
National Labor Relations Act, as amended (29 U. S. C. § 141 et seq.	3
New Jersey's General Public Assistance Law (NJSA 44:8-107 et seq.)	3, 4
New Jersey's Regulation on Payment of Welfare Assistance to Strikers	3
New Jersey's Assistance for Dependent Children Law (NJSA 44:10-1 et seq.)	3, 4
Social Security Act of 1935, as amended (42 U. S. C. § 602 et seq.)	3
New Jersey's Assistance to Families of the Working Poor Law (NJSA 44:13-1 et seq.)	3, 4
28 U. S. C. § 1254(1)	2
United States Constitution, Article VI	3

AUTHORITIES CITED.

Page

American Bar Association, Section of Labor Relations Law, 1972 Committee Reports, Vol. II, pp. 293-301 13

Comment, Welfare for Strikers: ITT v. Minter, 39 U. Chi. L. Rev. 79 (1971) 8

Harsh & Robinson, Little Impact Seen in 90-Day Steel Strike, Chicago Sun-Times, Aug. 1, 1971, at p. 7, col. 1 13

Note, Cases Moot on Appeal: A Limit on the Judicial Power, 103 U. Pa. L. Rev. 772 (1955) 5

Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672 (1970) 5, 10

Note, The Postman Always Rings Twice, 65 Col. L. Rev. 867 (1965) 5

Thieblot and Cowin, Welfare and Strikes: The Use of Public Funds to Support Strikers, University of Pennsylvania, Wharton School of Finance and Commerce (1972) 8, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No.

SUPER TIRE ENGINEERING COMPANY; SUPER-CAP CORPORATION; AND A. ROBERT SCHAEVITZ,
Petitioners,

v.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD; JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; INTERVENOR DEFENDANT: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Super Tire Engineering Company, Supercap Corporation, and A. Robert Schaevitz petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on November 22, 1972.

OPINIONS BELOW.

The opinion of the Court of Appeals (App., *infra*, pp. A1-A28) is reported at 469 F. 2d 911. The United States District Court for the District of New Jersey filed no formal written opinion; its oral opinion is set forth at App., *infra*, pp. A35-A36.

JURISDICTION.

The judgment of the Court of Appeals (App., *infra*, pp. A29-A30) was entered on November 22, 1972. A timely petition for rehearing was denied on December 20, 1972 (App., *infra*, pp. A32-A33). On March 12, 1973, this Court granted Petitioners' Application for an Extension of Time within which to file this petition to and including May 19, 1973 (App., *infra*, p. A34). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. The issue of whether State welfare assistance to strikers unconstitutionally interferes with the federal labor policy of free collective bargaining is a recurrent question

of significant national importance. Is this issue rendered moot by termination of a particular strike in a particular case, notwithstanding the continuing effect of such assistance upon the parties' collective bargaining relationship, and the fact that, if considered moot, the question will be inherently evasive of appellate review?

2. Does the application of the mootness doctrine in a labor context require, by reason of *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri*, 361 U. S. 363 (1960), a different rule of law than that articulated by this Court and other federal courts with respect to non-labor controversies?

3. Does the State grant of welfare assistance to strikers contravene federal labor policy by insulating one party—the striking union—from the economic disadvantages of a strike, and thus deviate from the State's required neutral position in collective bargaining?

CONSTITUTIONAL PROVISION INVOLVED.

Article VI, Clause 2, of the United States Constitution is set forth at App., *infra*, p. A39.

STATUTES INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended (29 U. S. C. § 141 *et seq.*), New Jersey's General Public Assistance Law (NJSA 44:8-107 *et seq.*), New Jersey's Regulation on Payment of Welfare Assistance to Strikers, New Jersey's Assistance for Dependent Children Law (NJSA 44:10-1 *et seq.*), the Social Security Act of 1935, as amended (42 U. S. C. § 602 *et seq.*), and New Jersey's Assistance to Families of the Working Poor Law (NJSA 44:13-1 *et seq.*), are set forth at App., *infra*, pp. A39-A61.

STATEMENT OF THE CASE.

On May 14, 1971, employees of Petitioner-Employers represented by Respondent Teamsters Local Union 676, in support of their collective bargaining demands, commenced a strike which was to last for a full six weeks until June 28, 1971. After ascertaining that many of the strikers were receiving welfare assistance from the State of New Jersey,[1] the instant suit was filed on June 10, 1971 seeking both declaratory and injunctive relief. The complaint alleged that such State subsidization of strikers, by necessarily prolonging strikes and/or increasing the cost of a strike settlement, frustrates the national labor policy of free collective bargaining and thereby contravenes the Supremacy Clause of the Constitution.

On June 24, 1971, the District Court, without holding an evidentiary hearing, dismissed the action, relying on *ITT Lamp Division v. Minter*, 435 F. 2d 989 (1970), *cert. den.*, 402 U. S. 933, *reh. den.*, 404 U. S. 874 (1971) (App., *infra*, pp. A35-A36). Appeal was thereafter taken to the Third Circuit which, on November 22, 1972, in a 2-1 decision (Gibbons, J., dissenting), dismissed the appeal as moot with directions to the District Court, on remand, to vacate its order and dismiss for the same reason (App., *infra*, pp. A1-A28). The panel majority, although observing that because ". . . of the time required to perfect appeals both to this Court and to the Supreme Court, review may be unavailable in the majority of cases such as this" (App., *infra*, p. A15), nevertheless concluded that while this Court's

1. Such payments were being made under New Jersey General Public Assistance, NJSA 44:8-107 *et seq.*, a State program, and Aid for Dependent Children (AFDC), NJSA 44:10-1 *et seq.*, a joint State-federal program. App., *infra*, pp. A40-A56). Effective June 30, 1971, after commencement of this action, New Jersey elected no longer to participate in the unemployed parent segment of the AFDC program and enacted, in lieu thereof, its Assistance to Families of the Working Poor program, NJSA 44:13-1 *et seq.*, which also provides benefits to striking employees (App., *infra*, pp. A57-A61).

recent pronouncements on mootness in other contexts ". . . perhaps indicat[e] some lessening of the mootness stricture, [they] do not appear to affect the vitality of *Oil Workers* in a labor context. If *Oil Workers* is to be found not harmonious with the current contours of the mootness doctrine, that decision should, and perhaps must, be made by the U. S. Supreme Court." (App., *infra*, p. A20). A subsequent petition for rehearing was denied by the Court of Appeals on December 20, 1972 (App., *infra*, pp. A32-A33).

REASONS FOR GRANTING THE WRIT.

A. The Decision Below Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Mootness questions present "a recurrent problem" for this Court which "have not evoked a consistent response"; the mootness doctrine, perhaps as a result, has become "unnecessarily confused and restrictive in light of justiciable philosophy."[2] The instant case presents an appropriate vehicle for this Court to resolve such confusion and provide guidance for the lower federal courts. It also squarely raises the question of whether this Court's decision in *Oil Workers* was intended, as construed by the Court of Appeals (App., *infra*, p. A20), to create an exception to the "current contours of the mootness doctrine" for cases arising in a labor context. This question, which constitutes a substantial and recurrent problem in the administration of national labor policy, is also worthy of resolution by this Court.

---

2. Note, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672, 1674, 1687 (1970). See also, Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. Pa. L. Rev. 772 (1955); and Note, *The Postman Always Rings Twice*, 65 Col. L. Rev. 867 (1965).

This Court, in both labor[3] and other[4] controversies, has recognized that the critical question in determining mootness is not whether there has been a settlement of the underlying dispute but, rather, whether the question presented is an important one which, unless resolved, is likely to recur. *Moore*, for example, involved a challenge to the validity of a statute whose provisions effectively deprived the complainant of the opportunity to run for elective office; although the election had already taken place when the case came before the Court, the statute which caused the alleged deprivation, with its prospective deterrent effect, remained in full force and precluded a finding of mootness. Similarly, although the short-term order of the Interstate Commerce Commission involved in *Southern Pacific* had expired pending review, the possibility that, absent determination, the Commission's order was "capable of repetition, yet evad-

3. See, e.g., *N. L. R. B. v. Raytheon Company*, 398 U. S. 25 (1970); *N. L. R. B. v. Local 825 Operating Engineers*, 400 U. S. 297 (1970); *N. L. R. B. v. Mexia Textile Mills*, 339 U. S. 563 (1958); and *Local 1976, Carpenters v. N. L. R. B.*, 357 U. S. 93 (1958). See also, *N. L. R. B. v. Marsh Supermarkets, Inc.*, 327 F. 2d 109 (7th Cir. 1963); *N. L. R. B. v. United Hatters*, 286 F. 2d 950 (4th Cir. 1961); *N. L. R. B. v. Plumbers Union of Nassau County, Local 457*, 299 F. 2d 497 (2nd Cir. 1962); *N. L. R. B. v. Globe Wernicke Systems Company*, 336 F. 2d 589 (6th Cir. 1964); *Pacific Maritime Assn. v. Longshoremen*, 454 F. 2d 262 (9th Cir. 1971); *Atlantic Richfield Co. v. Oil, Chemical & Atomic Workers Int'l. Union, AFL-CIO*, 447 F. 2d 945 (7th Cir. 1971); *General Dynamics Corp. v. Local 5, Shipbuilders*, 469 F. 2d 848 (1st Cir. 1972); and *Avco Corp. v. Local 787, UAW*, 459 F. 2d 968 (3rd Cir. 1972).

4. See, e.g., *Moore v. Ogilvie*, 394 U. S. 814 (1969); *Sibron v. New York*, 392 U. S. 40 (1968); *Southern Pacific Terminal Co. v. I. C. C.*, 219 U. S. 498 (1911); *United States v. W. T. Grant Co.*, 345 U. S. 629 (1953); *Carroll v. President and Commissioners of Princess Anne County*, 393 U. S. 175 (1968); *United States v. Concentrated Phosphate Export Ass'n., Inc.*, 393 U. S. 199 (1968); *Gray v. Sanders*, 372 U. S. 368 (1963); *Johnson v. New York State Education Department*, — U. S. —, 34 L. Ed. 2d 290 (1972) (Marshall, J., concurring); and *Roe v. Wade*, — U. S. —, 35 L. Ed. 2d 147 (1973).

ing review" also assured a viable controversy. And in *Raytheon*, this Court held an unfair labor practice dispute not to be moot although the alleged unlawful conduct had ceased and the respondent had fully complied with the Labor Board's remedial order. The test has thus been whether an important matter of general significance is at issue, either continuing in effect or likely to recur, and not, as presumed by the Court below in a labor context, whether the immediate situation which gave rise to the action has been terminated.

There is no reason to differentiate a labor dispute from any other controversy in applying the mootness doctrine.[5] Indeed, as the cases previously noted (see n. 3, *supra*) demonstrate, labor disagreements are even more likely than other actions "to be repeated" and preclude "a decision as to . . . legality . . . [from becoming] a futile exercise of jurisdiction." *N. L. R. B. v. Marsh Supermarkets, Inc.*, 327 F. 2d at 111. Collective bargaining, after all, is a "continuing and developing process . . . [and] not a detached and isolated procedure which, once reflected in a written agreement, becomes a final and

5. *Oil Workers*, it is submitted, does not require that in every case where there has been a termination of the underlying controversy, the mootness doctrine must be applied. There, the temporary, emergency seizure of a public utility, which had expired by its own terms three years prior to review by this Court, made the possibility of recurrence understandably speculative and remote, and thereby precluded entry of a meaningful order. 361 U. S. at 366, 367, 371. Here, however, recurrence is not merely conjecture, but a virtual certainty, and termination of Petitioners' strike by no means barred entry of a meaningful order resolving the disagreement as to whether New Jersey may grant welfare benefits to strikers. See, e.g., *Division 1287, Bus Employees v. Missouri*, 374 U. S. 74 (1963), the sequel to *Oil Workers*, which, as the dissent below observed, ". . . is quite closely on point, for it recognizes that the availability of state interference can have an ongoing effect upon the collective bargaining relationship, and that a controversy over such availability is not moot, as long as the affected relationship exists. . . ." (App., *infra*, p. A27).

permanent result";[6] the availability of State welfare assistance to strikers, accordingly, has a continuing impact which is not dissipated by the termination of a particular strike.[7] New Jersey, moveover, as the dissent below observed (App., *infra*, pp. A23-A24), "has no present intention of changing its policy with respect to such payments"; and that policy will continue to be challenged, therefore, by either the instant Petitioners or other employers.[8] This Court should determine whether in such circumstances, solely by reason of the fact that such a controversy arises in a labor context, there is an appropriate basis for finding mootness. As the dissent below concluded, "The issues in this case are of considerable public interest, and likely to recur. Over-anxiety on the part of the federal courts to find such cases non-justiciable is not consistent with our judicial obligations" (App., *infra*, pp. A27-A28).

---

6. *N. L. R. B. v. Newark Morning Ledger*, 120 F. 2d 262, 267 (3rd Cir. 1941), *cert. den.*, 314 U. S. 693 (1941). See also *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275 (1946); and *Aeronautical Lodge 727 v. Campbell*, 337 U. S. 521 (1949).

7. See, e.g., Thieblot and Cowin, *Welfare and Strikes: The Use of Public Funds to Support Strikers*, University of Pennsylvania, Wharton School of Finance and Commerce (1972); Comment, *Welfare for Strikers: ITT v. Minter*, 39 U. Chi. L. Rev. 79 (1971); and *Almacs, Inc. v. Hackett*, 312 F. Supp. 964, 967 (D. R. I. 1970).

8. The Court of Appeals acknowledged that, ". . . it is important to note the intervention of the Teamsters Union and the participation, *amicus curiae*, of the Chamber of Commerce of the United States. The presence of these parties does suggest an on-going interest in the issue raised in this litigation" (App., *infra*, p. A14). In fact, the Chamber repeatedly sought to intervene in these proceedings, *inter alia*, to avoid a finding of mootness but was granted only *amicus* status (App., *infra*, p. A31). *Cf., Grinnell Corp. v. Hackett*, — F. 2d —, 82 LRRM 2986, 2989-90 (1973): ("Moreover, the intervening Chambers of Commerce, who have filed their own complaint for declaratory and injunctive relief, represent many other employers in Rhode Island, as to at least some of whom the issue is certain to recur.")

B. The Decision Below Directly Conflicts With the Decisions of the First Circuit and Other Federal Courts.

The precise issue here presented—whether settlement of an underlying controversy moots the issue of the constitutional validity of the State grant of welfare assistance to strikers—has arisen before in several other federal courts. In each instance, rather than carving out a different rule for labor cases or viewing *Oil Workers* as controlling, the courts held the dispute not to be moot. The instant case presents the singular exception.

In *ITT Lamp Divisions, v. Minter, supra,* the case deemed controlling by the District Court, for example, the First Circuit concluded, that, although the strike there involved had terminated, *Southern Pacific* was dispositive; the Court noted that the legality of welfare payments to strikers was an issue which "has earlier vainly sought appellate review in this circuit and is likely again to be raised, bringing it close to the 'recurring question' category where significant public rights are involved and court review ought not, if possible, be avoided." 435 F. 2d at 991. This view was reaffirmed by the First Circuit again on March 15 of this year in *Grinnell Corp. v. Hackett,* n. 8, *supra.* There, the Court specifically held, again in an identical factual situation, that, since the issue would recur either as to the plaintiff in that case or other employers, ". . . a case such as this is not moot, although the particular strike which prompted the suit and the payment of benefits challenged have, as here, terminated by the time of appeal." 82 LRRM at 2989.

The three-judge Maryland District Court in *Francis v. Davidson,* 340 F. Supp. 351 (D. Md.), *aff'd per curiam,* 409 U. S. 904 (1972), the Rhode Island District Court in *Almacs, supra,* and the New York Court of Appeals in *Lascaris v. Wyman,* — N. Y. —, 82 LRRM 2634 (1972), all reached a similar non-mootness result, notwithstanding cessation of

the underlying strike, in welfare-to-striker situations. Moreover, the approach taken here by the Third Circuit has also been expressly rejected by the Eighth Circuit. In *Solien v. Miscellaneous Drivers and Helpers Union, Local 610,* 440 F. 2d 124, n. 5 (1971), that Circuit, relying on *ITT Lamp Division,* quoted this Court's declaration in *Grant,* n. 4, *supra,* that ". . . voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. . . . A controversy may remain to be settled." *Solien* concluded, in marked contrast to the decision below in this case, ". . . that the doctrine of mootness should not be used to perpetually frustrate judicial review of issues of public importance arising in otherwise justiciable cases . . . the policy of ensuring judicial review of issues of public importance which are inherently evasive of review compels us not to refuse review on the basis of mootness." 440 F. 2d at 127-128.

It is the very question of whether, in labor cases as opposed to other controversies, the rule should be that of *ITT, Grinnell* and *Solien,* or the diametrically opposite approach of the Third Circuit, which is presented by this case. The "real . . . choice is not between taking or not taking risks with the quality of the judicial process, but between securing or not securing the values of appellate review—stability, uniformity, and objectivity." *Id.* at 128, citing Note, 83 Har. L. Rev., n. 2, *supra,* at 1692. This choice is a critical one. It is one which should be made, accordingly, by this Court.

C. This Court Should Determine Whether State Welfare Assistance Improperly Infringes Upon the Federal Labor Policy of Free Collective Bargaining.

The fundamental issue raised in this case—which the Court of Appeals declined to decide as moot—is whether

State welfare assistance which subsidizes the striking union in a labor dispute unconstitutionally deviates from the neutral position required of a State by federal labor policy. Although the Court has declined to decide this question on other occasions,[9] in view of the substantial litigation [10] and dissension [11] which has been engendered by the absence of a definitive determination, it is respectfully submitted that, should this Court find that the Third Circuit erred in its application of the mootness doctrine, the instant case should also be utilized to resolve this nationally significant problem. This issue is one of importance to every employer and employee whose industrial relations are governed by a collective bargaining agreement, as well as to those who must exercise the ". . . difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge v. Williams*, 397 U. S. 471, 487 (1970). It is, therefore, also a question which warrants this Court's attention.

---

9. Review was denied in *ITT* (402 U. S. 933; 404 U. S. 874), notwithstanding the almost unprecedented effort by *eleven* States to obtain review in that case, and in *Francis* (409 U. S. 874). Counsel for Petitioners have been advised that the State of Rhode Island will file a petition for certiorari this month in *Grinnell*, and that the respondents there contemplate filing a cross-petition. The welfare-to-striker question in the instant case, if considered in conjunction with the unemployment compensation-to-striker issue in *Grinell*, would thus provide the Court with the opportunity to explore all aspects of this critical area.

10. See, e.g., *ITT; Grinnell; Francis; Lascaris; Almacs; Russo v. Kirby*, 453 F. 2d 548 (2nd Cir. 1971); *The Dow Chemical Co. v. Taylor*, — F. Supp. —, 57 F. R. D. 105 (1972).

11. Following the Court's summary affirmance in *Francis*, for example, the Department of Health, Education and Welfare announced that it would entertain comments from interested parties on a clarification of its regulations as to whether strikers were entitled to AFDC payments. 38 Fed. Reg. No. 1 (Jan. 3, 1973). More than 10,000 responses were received, and the proposed revision is still under Departmental study. 77 Daily Labor Report A-7 (April 20, 1973). A decision by this Court establishing whether, in fact, such payments are constitutionally permissible would, of course, significantly alleviate this controversy and HEWs resultant difficulties.

The courts which have considered the welfare-to-striker issue are in disagreement. The decision of the District Court, for example, which dismissed Petitioners' complaint under Rule 12(b)(6), F. R. C. P., without an evidentiary hearing on the basis that *ITT* had held that such an issue was not justiciable, is in obvious conflict with the First Circuit's own explication of *ITT* in *Grinnell* that the issue is substantial and "justiciable, albeit complex." 82 LRRM at 2788. *Grinnell,* therefore, as well as *Dow,* n. 10, *supra,* held that motions to dismiss prior to an evidentiary hearing should be denied; the District Court in this case granted precisely such a motion. This serious dislocation of welfare and labor policy, occurring in an area which threatens the very existence of collective bargaining,[12] requires resolution. The States, like the judiciary, have taken divergent views of their responsibilities;[13] the continuing dispute as to the payment of welfare benefits to strikers has threatened other welfare pro-

12. As Dr. Herbert Northrup of the University of Pennsylvania, an acknowledged expert in the field, declared in an affidavit submitted to the court below, "I do not think collective bargaining can in fact exist if we continue to support strikes by paying public benefits to private strikers. . . . I cannot see how collective bargaining can function effectively if the trend toward welfare benefits for strikers continue[s] at the present pace."

13. Cf., e.g., the position of Iowa in its *amicus* brief in support of the petition for rehearing in *ITT* (p. 3) ("the State of Iowa believes that allowing welfare assistance to persons on strike contravenes the Federal statutory scheme manifesting the general policy of free collective bargaining") with that of Massachusetts in its brief in opposition in that case (p. 5) (". . . the court of appeals [here] reached the only possible conclusion—substantial doubt that a significant frustration of federal collective bargaining policy was effected by the granting of welfare benefits to indigent strikers . . ."). The States, in short, do not now know whether their requisite neutrality in a labor dispute demands the withholding of welfare assistance from strikers (*amicus* brief of Wyoming in support of the pet. for reh., in *ITT,* p. 4) or whether, conversely, they may provide such benefits since "the asserted conflict involve[s] only a 'tangential frustration' of unfettered collective bargaining." Mass. Br. in Opp. in *ITT,* p. 5.

grams;[14] and the present conflict also jeopardizes, by permitting a striker in one State to receive a government subsidy while his counterpart a few miles away is denied such assistance, the need for "stabilizing labor relations conflict" through "a comprehensive national labor law." *Motor Coach Employees v. Lockridge*, 403 U. S. 274, 286 (1971). This Court should be particularly ". . . astute to avoid hindrances in the way of taking up . . ." a question of this magnitude. *Liner v. Jafco, Inc.*, 375 U. S. 301, 306 (1964).[15]

---

14. See, e.g., Thieblot and Cowin, *supra* n. 7, at pp. 124-5, 129-31; see also, Harsh & Robinson, *Little Impact Seen in 90-Day Steel Strike*, Chicago Sun-Times, Aug. 1, 1971, at p. 7, col. 1, quoting David Daniel, Director of the Cook County (Ill.) Department of Public Aid, to the effect that a long steel strike could deplete his agency's annual allotment and "boost the welfare roles immeasurably."

15. As the Committee on State Labor Law of the Section of Labor Relations Law of the American Bar Association stated in its 1972 Report: "The recent studies, along with the increased amount of litigation and the interest of numerous states in seeking a solution to this issue, suggest a need for some action. The present confusion on this issue has resulted in strikers being granted or denied public assistance on the basis of a particular state's interpretation of national labor policy or the state's interpretation of federal and state welfare legislation. It is doubtful whether the confusion on this issue will lessen in the year ahead and it would therefore be preferable to have the issue resolved on a uniform basis rather than perpetuate the current confusion. (footnotes omitted)." American Bar Association, Section of Labor Relations Law, 1972 Committee Reports, Vol. II, pp. 293-301.

CONCLUSION.

For all the foregoing reasons, Petitioners respectfully urge that this Court grant the petition for writ of certiorari.

Respectfully submitted,

Of Counsel:
STRADLEY, RONON,
STEVENS & YOUNG,
1300 Two Girard Plaza,
Philadelphia, Pa. 19102

LEDERER, FOX AND GROVE,
111 West Washington
Street,
Chicago, Illinois 60602

HERBERT G. KEENE, JR.,
1300 Two Girard Plaza,
Philadelphia, Pa. 19102

LAWRENCE M. COHEN,
111 West Washington Street,
Chicago, Illinois 60602
Attorneys for Petitioners.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 71-1773, 71-1774 AND 71-1775.

SUPER TIRE ENGINEERING COMPANY; SUPER-CAP CORPORATION: AND A. ROBERT SCHAEVITZ,
Appellants,

v.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY, WELFARE BOARD; JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; INTERVENOR DEFENDANT: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Appellees.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued September 14, 1972.

Before McLAUGHLIN, ADAMS and GIBBONS, *Circuit Judges.*

OPINION OF THE COURT

(Filed November 22, 1972)

ADAMS, *Circuit Judge.*

In this case, appellants claim three New Jersey welfare programs [1] that provide benefits to certain striking workers, violate the federal constitution, federal statutes and state statutes. Appellants,[2] alleging that their employees while engaged in an economic strike received aid under the challenged programs, sought an injunction restraining various New Jersey officials, appellees here,[3] from continuing to provide payments to the workers under these programs.

It is forcefully contended that these welfare programs directly interfere with free collective bargaining, a federal policy enunciated in the Labor Acts, 29 U. S. C. §§ 157-8, and are unconstitutional because they contravene the Supremacy Clause of the U. S. Constitution. They further assert that the inclusion of striking employees in the programs abridges the federal statute under which one of the programs is funded,[4] and the New Jersey statutes pursuant

---

1. There has been considerable confusion over which welfare programs New Jersey currently operates. From oral argument and subsequent memoranda it appears that appellants are challenging the following three programs: Aid for Dependent Children (A. F. D. C.), N. J. S. A. 44:10-1 *et seq.*, a joint state-federal program; Aid to Families of the Working Poor, N. J. S. A. 44:13-1 *et seq.*, a state program; General Public Assistance, N. J. S. A. 44:8-107 *et seq.*, a state program.

2. Appellants, Super Tire Engineering Company and Supercap Corporation, are New Jersey corporations; appellant, A. Robert Schaevitz, is a citizen of and taxpayer of New Jersey, as well as president and chief executive officer of appellant corporations.

3. The Teamsters Local Union No. 676, the certified collective bargaining representative for all production and maintenance employees of the corporate-appellants, was granted permission by the District Court to intervene on behalf of the defendant-appellees.

4. A. F. D. C. is a joint federal-state program created by § 402 of the Social Security Act, 42 U. S. C. § 602.

to which the state officials have promulgated regulations affecting striking employees.[5]

Critical to our disposition of the case, is the sequence of events. On May 14, 1971, at the conclusion of a three-year contract, negotiations having been to that point unfruitful, the employees began an economic strike. Shortly thereafter, as the employers allege, certain of the employees sought public assistance under one of the specific welfare programs. On June 10, 1971, the complaint giving rise to this litigation was filed, and on June 14 the District Court ordered that a hearing on the request for a preliminary injunction be held on June 24.[5a] At that hearing the state officials and the union moved to dismiss the employers' complaint pursuant to Rule 12b(6), F. R. Civ. P. The trial judge, persuaded by I. T. T. Lamp Division v. Minter, 435 F. 2d 989 (1st Cir. 1970), *cert. denied*, 402 U. S. 933, *rehearing denied*, 404 U. S. 874 (1971), on July 13 dismissed the complaint and the motion for a preliminary injunction.

The union states that the strike "ended immediately prior to the June 24, 1971 hearing." The employers allege that the "employees did not return to work until June 28, 1971." Under either factual situation, a new contract hav-

---

5. The question whether the regulations governing each of the programs comport with the New Jersey statute under which they are promulgated is one of state law. Resolution of that issue might render unnecessary a decision on the basic constitutional challenges. In such circumstances, it is normally the duty of federal courts to abstain, awaiting a definitive pronouncement from a state court on questions of state law. We do not address this issue because it would not be reached until the Court determines that the case is within its jurisdiction. Railroad Commission v. Pullman Co., 312 U. S. 496 (1941).

5a. The jurisdiction of the District Court was alleged to be grounded on 28 U. S. C. § 1331 and § 1337. The applicability of § 1337 need not be discussed, for, it appearing that the amount in controversy exceeds $10,000, jurisdiction can be based on § 1331.

ing been accepted and ratified,[5b] it is clear that the labor dispute undergirding this challenge to the New Jersey programs had been concluded before the trial judge dismissed the action and long before appeals were filed or argued in this Court.

Although many important questions of law have been ably argued and briefed by both sides, it now appears to this Court that the resolution of the underlying labor dispute raises squarely the issue of mootness.

I.

Article III of the Constitution commands that the federal judicial power shall extend only to cases and controversies. Thus, lacking a case or controversy, the federal courts are without jurisdiction. In North Carolina v. Rice, 404 U. S. 244 (1971), the Supreme Court states explicitly that mootness is an article III jurisdictional issue, setting forth the fundamental considerations:

> "Although neither party has urged that this case is moot, resolution of the question is essential if federal courts are to function within their constitutional sphere of authority. Early in its history, this Court held that it had no power to issue advisory opinions, Hayburn's Case, 2 Dall. 409 (1792), as interpreted in Muskrat v. United States, 219 U. S. 346, 351-353 (1911), and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. Oil Workers

5b. At the hearing before the District Court on plaintiffs' motion for a preliminary injunction, the transcript of which appears as pages 52a-72a of the appendix filed by plaintiff-appellants, counsel for the plaintiffs stated:

> ". . . the strike was ended as of yesterday in that our latest contract was ratified by the Union Membership yesterday and they plan a return to work tomorrow." Appendix at 65a.

Unions v. Missouri, 361 U. S. 363, 367 (1960). To be cognizable in a federal court, a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 240-41 (1937). However, '[m]oot questions require no answer.' Missouri, Kansas & Texas R. Co. v. Ferris, 179 U. S. 602, 606 (1900). Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions.' United States v. Alaska S. S. Co., 253 U. S. 113, 116 (1920), quoting California v. San Pablo & Tulare R. Co., 149 U. S. 308, 314 (1893); our impotence 'to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.' Liner v. Jafco, Inc., 375 U. S. 301, 306 n. 3 (1964). See also Powell v. McCormack, 395 U. S. 486, 496 n. 7 (1969). Even in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction. Henry v. Mississippi, 379 U. S. 443, 447 (1965). Liner v. Jafco, Inc., supra, at 304." 404 U. S. at 246.

Beyond these dictates, however, broad statements about mootness suffer the same infirmity as general discussions about most abstruse subjects.[6] Though mootness

6. In Association of Data Processing Service Organizations, Inc. v. Camp, 397 U. S. 150 (1970), Justice Douglas ascribed to discussions of standing a quality equally applicable to discussions of mootness. "Generalizations about standing to sue are largely worthless as such." *Id.* at 151.

is a constitutional problem, an articulation of the specific parameters of the doctrine has never been assayed by the Supreme Court.[7] Rather, the doctrine of mootness is protean in nature, assuming different shapes at different times. Indeed, the recent cases confronting the issue would appear not to produce a unitary coherent line.

The problem of mootness presents a recurring refrain in several types of cases. Analysis of them reveals four concerns that the Supreme Court addresses in terms of mootness. They are: that some sort of judicial decree be possible, that the parties remain in a posture sufficiently adverse to insure effective litigation, that the issue in contention continue to be concrete, and that the issue not be one that will recur and yet be unreviewable. Beyond these observations, however, conclusions become difficult. This difficulty is at least in part attributable to the proximity of mootness to several other justiciability precepts, and the tendency of courts to become unclear as to just which doctrine is applicable. For example, the concern with sufficient adversity is related to the question of "standing," and the fear regarding loss of concreteness approaches ripeness. Further beclouding the problem is the seeming congruence, at times, of the jurisdictional requirements for declaratory judgments and the mootness doctrine. *See e.g.*, Golden v. Zwickler, 394 U. S. 103 (1969). In spite of the impediments involved in attempting to draw conclusions about the content of the mootness doctrine, the resolution of this case requires that the concerns to which mootness responds be developed.

The early mootness cases were bottomed on the Court's unwillingness to act unless it could issue a decree that would affect the legal rights of the parties to the litiga-

7. *See generally*, Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672 (1970); Note, Cases Moot on Appeal: A Limit on the Judicial Power, 103 U. Pa. L. Rev. 772 (1955).

tion. There frequently was no discussion of the underpinning of the concept, but it is clear that the Court considered that the phrase "judicial power" encompassed situations only in which an effective decree could be rendered, or that such a situation was not a "case" or "controversy." In Singer Manufacturing Co. v. Wright, 141 U. S. 696 (1891), a Georgia tax was alleged to discriminate impermissibly between two classes of retailers. Singer brought suit to enjoin collection of the tax as levied against it. Before the appeal reached the Supreme Court, Singer, still pursuing the litigation, paid the tax. Although acknowledging that an action for restitution, which would raise the same issues, might lie, the Supreme Court dismissed the case as moot because nothing remained to be enjoined. *See,* Commercial Cable Co. v. Burleson, 250 U. S. 360 (1919). *See generally,* Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672, 1674-5 (1970).

Much of the recent motion in the mootness field has occurred in cases involving convicted criminals who have been released from prison. The leading cases, separated by twenty-five years, illustrate the Court's shift from emphasis on an effective decree to a more functional approach in the context of a criminal situation, looking for sufficient interest and adversity between the parties. Both St. Pierre v. United States, 319 U. S. 41 (1943), and Sibron v. New York, 392 U. S. 40 (1968), were challenges brought by persons whose prison terms had been completed. In *St. Pierre,* the court dismissed as moot, stating:

> "On the argument it was conceded that petitioner had fully served his sentence before certiorari was granted. We are of opinion that the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate.

> A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. United States v. Alaska S. S. Co., 253 U. S. 113, 115-16, and cases cited; United States v. Hamburg-American Co., 239 U. S. 466, 475-77." 319 U. S. at 42.

See Parker v. Ellis, 362 U. S. 574 (1960). *Sibron*, however, was not held to be moot because, as the Court asserted, the brevity of the sentence made review before release impossible, and the enduring effects of the conviction assured that Sibron would diligently litigate the question, and in a concrete factual context. *See* Mancusi v. Stubbs, 408 U. S. 204 (1972). A lack of concreteness seemed the motivation for a finding of mootness in North Carolina v. Rice, *supra*. *See* Aikens v. California, 406 U. S. 813 (1972).

Another group of cases includes those in which something other than the passage of time creates the mootness problem.[8] This class of case involves changed circumstances or voluntary cessation of a questioned activity. Thus, changing conditions have at times led to an invocation of the mootness doctrine. In Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U. S. 582 (1961), the enactment of an amendment to a Sunday-closing statute, plus the election of a new prosecutor were held to moot an assault on the "Blue Laws." In Golden v. Zwickler, *supra*, Zwickler was challenging a New York statute prohibiting the distribution of anonymous handbills. The handbills he desired to distribute attacked Congressman Multer, an incumbent running for reelection

8. Cases dealing with elections that have taken place, orders that have expired before review, and injunctions that have lapsed, discussed *infra*, are a third type of case in which mootness occurs.

in 1964. Before the case was heard by the U. S. Supreme Court, Multer had become a Justice of the Supreme Court of New York. His target thus having been removed from active politics and unlikely to reappear, Zwickler's appeal was held not to be justiciable any longer.[9] These two cases exemplify the Court's concern both with the concreteness of the controversy and the continuing adverse nature of the parties. The same elements seem to be operative in SEC v. Medical Committee for Human Rights, 404 U. S. 403 (1972), where the ruling of the Commission that Dow need not include an anti-napalm proposal in its 1968 proxy solicitations was held no longer reviewable. The finding of mootness was based on Dow's voluntary inclusion of the proposal in its 1971 solicitation, the less-than-3% support that the proposal received at that time, and SEC regulations which permitted Dow to delete for three years a proposal with such limited support.[9a]

The most frequently quoted cases of the voluntary cessation type are United States v. W. T. Grant & Co., 345 U. S. 629 (1953) and United States v. Trans-Missouri Freight Assn., 166 U. S. 290 (1897). Both involved conduct by defendants claimed to be in violation of the antitrust laws. The defendants, in each case, ceasing the allegedly illegal activity, urged that the proceedings brought by the government had thus become moot. In each case the Court, looking to the public interest in enforcement of the antitrust law, and the possibility that the defendants might repeat the questioned activity, held that the cases were not moot. The decisive considerations in *Grant* and *Trans-*

9. As discussed earlier, Golden v. Zwickler, *supra,* is not technically a mootness case but one posing a problem under the declaratory judgment act. Nevertheless, it is frequently cited as a mootness case.

9a. *See* Johnson v. New York State Educ. Dep't, 41 U. S. L. W. 4018 (U. S. Nov. 20, 1972).

Missouri are not as clear as in some other mootness cases. Nevertheless, the interest of the government in seeing that its laws not be evaded by the practice of ceasing questioned activity when challenged, assure that the government will be an active litigant. The fact that the questionable activity was being conducted at the start of the litigation appeared to aid the Court by providing a concrete controversy.

Another line of cases dealing with mootness is comprised of those in which the passage of time has caused the immediate object of the litigation to become unobtainable. Typical are disputes that in some way challenge election laws. In these cases a private citizen is the plaintiff and the government is the defendant. The mootness problem arises because the election has passed. Three cases in which this issue appeared have been held moot, Brockington v. Rhodes, 396 U. S. 41 (1969); Hall v. Beals, 396 U. S. 45 (1969); and Socialist Labor Party v. Gilligan, 406 U. S. 583 (1972). *Brockington* was a suit brought by a would-be candidate for Congress seeking a writ requiring the election board to list his name on the ballot, a step the board had refused to take since the nominating petitions filed by the aspirant were short of the required number of signatures. The Supreme Court stated that because the election was passed, the case was moot since the only relief sought was now unavailing. *Brockington* would appear to be a return, perhaps anachronistically, to the "effective decree" standard.

Hall was a challenge to Colorado's six-month residency requirement for voting. An amendment to the statute reducing the requirement to two months, and the passage of the election were held to moot the appeal. Since the amendment reducing the residency requirement would have permitted the plaintiffs to vote, and, they would be eligible

to vote in the next election, this case is perhaps explained as a decision based on a lack of adversity.

In *Socialist Labor Party* the statute attacked as unconstitutional was amended, correcting many of the infirmities that had been alleged by the plaintiffs. The Socialist Labor Party attempted to keep their suit alive by pointing to an unamended oath provision. The Court, finding that the heart of the suit had been removed, refused to permit it to be pursued on this tangential issue.[10]

A greater number of cases wherein the election has passed have been held not moot. In Gray v. Sanders, 372 U. S. 368 (1963), Georgia's county-unit primary system was assailed. Though the use of the specific system had been enjoined in the district court, and the Democratic Party, whose primary was the one challenged, actually held the election on a popular basis, the Supreme Court did not find the case moot. The Court stated two reasons for proceeding to the merits. First, the district court's injunction regulated only the present election, and dismissal of the case would restore Georgia to the *status quo ante,* i.e., able to conduct future elections under the county-unit system. Second, citing United States v. W. T. Grant, *supra,* the Court held that the Democrats' voluntary abstention from the challenged activity did not guarantee such restraint in the next election. Though nowhere so articulated, this approach indicates that if the activity contraverted is imbedded in a statute, rendering high the

10. Similar to *Socialist Labor* is Diffenderfer v. Central Baptist Church, 404 U. S. 412 (1972). In *Diffenderfer,* the tax-exemption accorded a church owned parking lot under a Florida statute was questioned. After the statute was amended, the appeal reached the Supreme Court, which held that it would not decide speculative questions about the new statute, and that the matter was now moot. Both these cases thus seem to indicate that the Court will not act when the main issue has been resolved and only an incidental issue remains to be decided.

probability of repetition, and the complainants will suffer with each repetition, then there is sufficient adversity. *See* Bullock v. Carter, 405 U. S. 134, 141 n. 17 (1972). *See generally* Note, 83 Harv. L. Rev. at 1684-5.[11]

A final series of cases introduces another element into the mootness doctrine. These cases are brought by parties who suffer injury from effects of a short-lived government order. The Supreme Court has stated that if the impact of such order will always pass before review is possible, then the case is not moot, for a finding of mootness would foreclose any possibility of review. The progenitor of this type of suit is Southern Pacific Terminal Co. v. ICC, 219 U. S. 498 (1911). ICC had ordered Southern Pacific to cease giving preferences to certain shippers, the order to continue for two years. Southern Pacific's appeal from the order was not heard by the Supreme Court until after the two-year provision of the order had ended. Holding the case not moot, the Court stated that a finding of mootness would create a class of situations in which, because of the short duration of the directive, the government could

---

11. The Court in three recent election situations has held not moot cases on appeal after the election has passed. In Fortson v. Toombs, 379 U. S. 621 (1965), another case arising from Georgia, the Court vacated and remanded the decree of a three-judge district court, but did not hold the case moot. The vacation and remand, however, may well have been motivated by concerns approaching the concreteness element of the mootness doctrine.

Whitcomb v. Chavis, 403 U. S. 124 (1971), and Roudebush v. Hartke, 405 U. S. 15 (1972), arose in Indiana. In *Whitcomb*, a multi-member legislative-district plan was in question. Although after the election, the Court proceeded to decide this case because a finding of mootness followed by vacation of the lower court's order might result in the return of the challenged procedure and reinstitution of the lawsuit, which would raise the same issues.

In *Roudebush*, a suit involving the propriety of a state court's ordering a recount in a contest for the office of U. S. Senator, the constitutional issue of who is ultimately to judge the result of the race, the U. S. Senate or the state, remained clearly in contention, barring a finding of mootness.

engage in actions "capable of repetition, yet evading review." 219 U. S. at 515.

Recent cases have relied on this doctrine. In *Moore v. Ogilvey*, 394 U. S. 814 (1969), the petitioners had raised a challenge to an Illinois requirement that a potential nomineee amass signatures in fifty counties. Citing *Southern Pacific*, the Court held that this case was justiciable, though the election had passed, for if the 50-county requirement were not tested, there would be a high degree of certainty that it would continue to be controlling from election to election. The same considerations preserved the justiciability of an attack upon a Tennessee residency-for-voting requirement in Dunn v. Blumstein, 405 U. S. 330, 333-4 n. 2 (1972).

In Carroll v. President and Commissioners of Princess Anne County, 394 U. S. 175 (1968), the prevention of potentially inflammatory "white supremacist" rallies by a ten-day injunction was on appeal in the Supreme Court. The impossiblity of review of a ten-day injunction before its expiration and the persistence of the petitioners, both by pursuing the legal questions and by agitating with "continuing activities and programs," foreclosed a holding of mootness.

Having discussed these various components of the mootness doctrine, it remains to relate them to the assault on the "interpretive regulations" of New Jersey's welfare program presently before this Court. In many respects, this is a close case, with the arguments seeming to be nicely balanced.

The employers urged that they are suffering continuing injury from the mere existence of the welfare programs. Unless this argument is accepted, it appears that this case is moot. The only relief sought by the employers that could now be of any use would be a declaratory judgment.

Though such a declaration might not be impermissible, the considerations encompassed in the mootness doctrine need be addressed.

Adversity must be judged by an objective standard. Here, absent a continuing injury, the posture of the plaintiffs may not be sufficiently antagonistic. As in *Hall v. Beals, supra,* one who has been injured but will be impaired only in the future if certain speculative contingencies come to pass can no longer pursue the litigation. Moreover, the willingness of the state officials adequately to defend policies now threatened, not with an injunction, but only by a declaratory judgment, may be substantially diminished.[12] Having stated this, it is important to note the intervention of the Teamsters Union and the participation, *amicus curiae,* of the Chamber of Commerce of the United States. The presence of these parties does suggest an on-going interest in the issue raised in this litigation.

The procedural posture of this case makes it the antithesis of a "concrete" dispute. No testimony has been taken, no evidence adduced, no findings made. Thus, we are not faced with the prospect of stating that a lengthy trial must go for nought. Rather, we are asked to decide "questions of law" in somewhat of an abstract setting. Moreover, the real possibility of change in the regulations renders this case conjectural.[13]

---

12. In W. T. Grant, *supra,* and Trans-Missouri, *supra,* defendants' willingness to defend can be assumed to have been motivated by a desire to avoid the type of relief sought by the government and a fear of subsequent private treble-damage actions, strong motivators indeed.

13. As plaintiff-appellants' complaint and memorandum in support of their motion for preliminary injunction make clear, their challenge is aimed at an interpretative regulation promulgated by defendant-Commissioner. Interpretative regulations are among the most rapidly changing of the oft-changed components of welfare programs.

Finally, we must deal with the contention that this is a government program "capable of repetition, yet evading review." As will be developed, infra, that contention was raised but not met in ITT v. Minter, *supra*. The presence, in that case, of a still active labor dispute raises doubts about the argument that this is a situation capable of evading review. *See* Russo v. Kirby, 453 F. 2d 548 (2d Cir. 1971). Nevertheless, cognizant of the time required to perfect appeals both to this Court and to the Supreme Court, review may be unavailable in the majority of cases such as this.

Thus, to avoid holding that this case is moot, it must be found either that this appeal falls into the *Southern Pacific* category, or that the presence of the programs has an on-going direct effect on the appellants.

II.

The analysis of the mootness doctrine indicates that the continuing vitality of this case turns on two close issues: the "continuing effects" question and the *Southern Pacific* question. A resolution is, however, made simpler by a Supreme Court case, centrally important to determining the answers crucial to this appeal.

In Local No. 8-6, Oil, Chemical and Atomic Workers, Int'l. Union, AFL-CIO v. Missouri, 361 U. S. 363 (1960), the union, representing employees of a private company selling natural gas, challenged the constitutionality of a Missouri statutory scheme, referred to as the King-Thompson Act. The Missouri legislation provided that, upon finding certain conditions present, the Governor could seize and operate a privately-owned public utility being struck, and that strikes against such facilities after the take-over would be unlawful. Having struck the gas company, that the Governor then seized, the employees were enjoined from further work stoppages, in accordance with the statutory

program. The day after the injunction issued, the strike ended. One month later the underlying labor dispute was resolved and eleven weeks after that the seizure was terminated. The union continued to appeal the issuance of the injunction and sought a declaration that the Missouri statute was unconstitutional, interfering with the workings of the National Labor Relations Act—the basis of the Supremacy Clause claim both in *Oil Workers* and in the present appeal—and further alleging that there was a violation of the Due Process clause of the Fourteenth Amendment. Although the Missouri Supreme Court adjudicated the union's appeal on the merits, the United States Supreme Court held that the expiration of the injunction and settlement of the labor dispute rendered the case moot.

In Division 1287, Bus Employees v. Missouri, 374 U. S. 74 (1963), the same Missouri statute was challenged, there in the context of a labor dispute unsettled even when the case reached the Supreme Court. The Court, holding *Bus Employees* adjudicable, distinguished *Oil Workers* and Harris v. Battle, 348 U. S. 803 (1954), an earlier case relied on in *Oil Workers,* and stated that the resolution or continuation of the labor dispute was determinative of mootness.

> "Reliance for the claim of mootness is placed upon this Court's decisions in Harris v. Battle, 348 U. S. 803, and Oil Workers Unions v. Missouri, 361 U. S. 363. In the Oil Workers case the Court declined to consider constitutional challenges to the King-Thompson Act, and in the Harris case declined to rule on the constitutionality of a similar Virginia statute, on the ground that the controversies had become moot. *In both of those cases, however, the underlying labor dispute had been settled and new collective bargaining agreements concluded by the time the litigation reached this Court. Here, by contrast, the labor dispute remains unresolved.*" 374 U. S. at 77-8 (Emphasis added).

The employers here contend that, despite the settlement of the labor dispute, the present case is not moot. In support of their position they urge that the termination of the strike does not end the injury they suffer, but rather that their ability to bargain collectively with the union when the contract is terminated is hampered by the very existence of the welfare programs. They next claim that, since collective bargaining has been held to be an on-going process,[14] there is still an active dispute to be adjudicated, and that they continue to suffer injury.

The second argument crucial to avoiding dismissal for mootness maintains that this case should be considered in the limited, *Southern Pacific* class of cases "capable of repetition, yet evading review." In *ITT Lamp Division*[15] the Court of Appeals for the First Circuit was presented with a case quite similar to the present one.[16] Responding to the mootness issue, the First Circuit stated that the problem did indeed appear to be "close to the 'recurring ques-

14. Our attention has been called to the cases of Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275 (1946) and Aeronautical Industrial District Lodge 727 v. Campbell, 337 U. S. 521 (1949). Both cases dealt with the rights to reemployment of veterans returning from the Second World War. While it is clear that they can be said to stand for the proposition that collective bargaining is an on-going process, they do not address a problem similar to the one raised here and thus cannot be dispositive of the mootness problem.

15. Appellants point out that the United States Supreme Court denied certiorari in *ITT*, and did not vacate as moot. No conclusions may be drawn from the denial of certiorari. *See* Maryland v. Baltimore Radio Show, Inc., 338 U. S. 912 (1950) (Frankfurter, *J.*); H. M. Hart & H. Wechsler, The Federal Courts and the Federal System 61 (1953).

16. The First Circuit, finding that there was not a federal preemption and that a balancing of the effects upon each other of the federal-labor and the joint federal-state welfare policies was required, held that this was a role more properly played by the Congress and affirmed the District Court's denial of relief. In view of our disposition of the case, we need not comment further on the First Circuit's action.

tion' category," citing *Southern Pacific,* 435 F. 2d at 991. The First Circuit, however, did not decide nor was it required to decide whether the issue was within the *Southern Pacific* ambit, for a second case, raising the same labor-welfare challenge, had already been joined on appeal, and in the latter case the strike had not yet been resolved.[17]

Oil Workers, however, responds to both questions essential to the employers' argument. In *Oil Workers,* just as in the present case, the threat to strike, labor's principal economic weapon, was affected by a state program. The employees in *Oil Workers* could have contended that their collective bargaining ability had been hindered by their employer's knowledge that a strike could provoke an injunction terminating the work stoppage, without resolving the dispute.[18] The present case would appear to be the obverse of this. Here, the employers can arguably claim that their collective bargaining ability is hindered by the employees' knowledge that a strike might be made more endurable through receipt of welfare benefits.

The Supreme Court, in *Oil Workers,* citing its earlier dismissal of Harris v. Battle, *supra,* squarely rejected both portions of appellants' argument:

> "In Harris v. Battle, 348 U. S. 803, these principles were given concrete application in a context so

---

17. Indeed, Judge Coffin stated, after discussing the *Southern Pacific* doctrine, "In any event, however, the appeal of Maurice Concrete [the appeal joined with *ITT,* in which the dispute had continued] presents the identical question." 435 F. 2d at 991.

The fact that a strike was still in existence at the time the appeal was before the First Circuit indicates that evasion of review is not inevitable.

18. In *Bus Employees,* supra, the Court stated that the threat of reinvocation of the seizure act in *Oil Workers* was only speculative. This may well be read to indicate that the detrimental effect on collective bargaining because of the "background fears" argument, alone, is not weighty enough to keep alive a controversy.

parallel as explicitly to control disposition of the primary issue here. That case originated as an action to enjoin the enforcement of a Virginia statute, markedly similar to the King-Thompson Act, under which the Governor had ordered that 'possession' be taken of a transit company whose employees were on strike. Although the labor dispute was subsequently settled and the seizure terminated, the trial court nevertheless proceeded to decide the merits of the case, holding that the seizure was constitutional. Harris v. Battle, 32 L. R. R. M. 83. The Virginia Supreme Court refused an appeal. Harris v. Battle, 195 Va. lxxxviii. In this Court it was urged that the controversy was not moot because of the continuing threat of state seizure in future labor disputes. It was argued that the State's abandonment of alleged unconstitutional activity after its objective had been accomplished should not be permitted to forestall decision as to the validity of the statute under which the State had purported to act. It was contended that the situation was akin to cases like Southern Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U. S. 498, 514-516. In finding that the controversy was moot, the Court necessarily rejected all these contentions. 348 U. S. 803. Upon the authority of that decision the same contentions must be rejected in the present case. See also Barker Co. v. Painters Union, 281 U. S. 462; Commercial Cable Co. v. Burleson, 250 U. S. 360. 361 U. S. at 368-9.[19]"

19. Three Justices dissented in *Oil Workers*. Their dissent, however, was bottomed on the possibility that striking union members might be liable for monetary damages or loss of seniority, a question the majority held not to be properly before the Court. No one expressed any doubts that the resolution of the labor dispute mooted the major issue in the case, the constitutionality of the injunction.

More recent Supreme Court pronouncements on mootness in labor cases have not significantly undercut the *Oil Workers* rule that settlement of the underlying labor dispute, absent special circumstances, requires a holding of mootness. *See* Sears, Roebuck & Co. v. Carpet Layers, 397 U. S. 655 (1970).

In Liner v. Jafco, Inc., 375 U. S. 301 (1964), a Tennessee state court enjoined picketing at a building site, and required the contractors who had sought the injunction to post a bond to indemnify petitioners if the injunction were "wrongfully" sued out. The Tennessee Court of Appeals, finding that the construction at the site had been completed, dismissed the enjoined picketers' challenge as moot. The U. S. Supreme Court, holding that mootness is a federal question, addressed the issues raised by the petitioners. The Court held that the petitioners, whose federally protected rights might have been abridged, and for whose benefit the bond had been posted, had a substantial continuing stake in the litigation both because their rights had already been abridged and because provision had been made to redress such deprivation if found unlawful. In the case now pending, such considerations are not present. Moreover, state court interference with labor problems arguably within the exclusive jurisdiction of the NLRB is a matter which the Supreme Court held particularly important previously, and therefore felt compelled to adjudicate the case.

The cases discussed in Part I of this opinion, while perhaps indicating some lessening of the mootness stricture, do not appear to affect the vitality of *Oil Workers* in a labor context. If *Oil Workers* is to be found not harmonious with the current contours of the mootness doctrine, that decision should, and perhaps must, be made by the U. S. Supreme Court.

The *Oil Workers* case requires that we dismiss this appeal. The lack of immediacy and solidity of interest necessary to support jurisdiction is reflected here in the atmosphere of abstraction, ambiguity, and conjecture surrounding this matter. Accordingly, we now dismiss this appeal as moot with directions to the District Court, on remand, to vacate and dismiss for the same reason. *See* United States v. Munsingwear, 340 U. S. 36 (1950). *Cf.* Socialist Labor Party v. Gilligan, 406 U. S. at 592-3, n. 3 (Douglas, J. dissenting).

This disposition is consonant with a proper appreciation of the role of the federal judiciary when asked to decide the constitutionality of state statutes and programs. In such cases, our task does not involve conjuring up situations to preserve an otherwise quiescent issue, nor does our assignment include constitutional adjudication unless such is necessarily implicated in the decision of a case or controversy squarely before the Court. *See* Ashwander v. TVA, 297 U. S. 288, 346-8 (1936) (Brandeis, J. concurring). Because we act only when required, can we legitimately act at all. The issue presented to the Court is now moot, therefore, we must stay our hand.

An order will be prepared, remanding the case to the District Court for disposition consistent with this opinion.

GIBBONS, *C. J.*, dissenting.

This is an appeal from a dismissal by the district court pursuant to Rule 12(b)(6), Fed. R. Civ. P., for failure to state a claim upon which relief may be granted. The appellants are two New Jersey corporations engaged in the tire sales and service business. According to the complaint, all their production and service employees are represented by the intervenor defendant, Teamsters Local Union No. 676. On May 14, 1971, upon the expiration of

a collective bargaining agreement which had been in effect since May 15, 1968, the local struck as a result of the parties' failure to reach a new agreement. According to the complaint, that strike was still in progress when the complaint was filed on June 10, 1971. The only hearing was that held on June 24, 1971. That hearing was on the plaintiffs' motion for a preliminary injunction, in support of which the plaintiffs were prepared to offer testimony. At the hearing the intervening defendant, Local Union No. 676, was permitted to intervene; the Attorney General, representing the public official defendants, was permitted to make an oral motion to dismiss for lack of jurisdiction under 28 U. S. C. § 1337, upon which the court never ruled. The intervening defendant was permitted to make an oral motion to dismiss for failure to state a claim upon which relief may be granted. In advancing the Rule 12(b)(6) motion, counsel for the local relied upon the opinion of the First Circuit in *ITT Lamp Division v. Minter*, 435 F. 2d 989 (1st Cir. 1970), *cert. denied*, 402 U. S. 933 (1971); although, as that opinion makes clear, the district court decision reviewed was the denial of a preliminary injunction after an evidentiary hearing. The district court below declined to take testimony, and dismissed solely upon the basis of the allegations in the complaint. Thus, assuming that the case is still justiciable, our review would be confined to the legal sufficiency of the allegations of the complaint, in particular the allegations in paragraph 14:

> "Plaintiffs believe and therefore aver that the payment by the State of New Jersey through its instrumentalities and political subdivisions, pursuant to the aforesaid interpretative regulation, of public assistance and public welfare benefits to individuals and the families of individuals who voluntarily leave their

> employment to directly engage in and actively participate in an economic strike against their employer, interferes with and infringes upon free collective bargaining as guaranteed to Plaintiffs by Congress under the Labor-Management Relations Act of 1947, as amended, 29 U. S. C. § 141 *et seq.;* constitutes an intrusion by the State of New Jersey into the field of labor-management relations which Congress has preempted and occupied to the full extent of its powers; and, accordingly, violates Article VI, Clause 2 of the Constitution of the United States."

At the hearing the plaintiffs were prepared to offer testimony in support of their claim that the availability of welfare benefits for strikers did in fact interfere with and infringe upon free collective bargaining. The absence of such proof at the hearing upon the preliminary injunction was relied upon by the *Minter* court as one reason, among others, for affirming the denial of a preliminary injunction in that case. Here, the plaintiffs were prepared to offer such evidence, but the court ruled that the complaint failed to state a cause of action. Reading the complaint as a whole, and particularly paragraph 14, it is perfectly clear that the gravamen of the charge is that the *availability* of strike benefits adds the economic power of the state to the union side, and thereby interferes with the *collective bargaining relationship.*

Thus, this controversy is moot only (1) if welfare benefits to strikers are no longer available, or (2) if there is no longer a collective bargaining relationship which can be affected by such availability. It is clear from the briefs filed on behalf of the public defendants that welfare benefits are still available to strikers in New Jersey, and that the state has no present intention of changing its

policy with respect to such payments. Thus, the only basis upon which this controversy may be classified as moot is a finding that there is no longer a collective bargaining relationship which can be affected by the acknowledged continued availability of welfare benefits for strikers.

Since no testimony was taken in the district court, the record is almost totally devoid of any facts with respect to the actual status of the collective bargaining relationship. The judges in the majority act upon the conflicting representations of counsel as to the date of termination of the strike. The opinion states:

> "The union states that the strike 'ended immediately prior to the June 24, 1971 hearing.' The employers allege that the 'employees did not return to work until June 28, 1971.' Under either factual situation, a new contract having been accepted and ratified, it is clear that the labor dispute undergirding this challenge to the New Jersey programs had been concluded before the trial judge dismissed the action and long before appeals were filed or argued in this Court." (footnote omitted)

With deference, it is a long logical leap from the very little information furnished to us upon which counsel agree, and the conclusion drawn by the majority. Among the unanswered questions are these:

A. There is a contract, but is it of long or short duration?

B. If it is of short duration, will collective bargaining over terms of its renewal, extension or modification continue while it is in effect?

C. Whether it is of long or of short duration, does it have a binding grievance/arbitration and no-strike

provision, or is the union free to strike over grievances?

D. Will the availability of welfare benefits to strikers have any effect upon the bargaining relationship in any of the above situations?

The plaintiffs vigorously assert that the bargaining relationship is still affected by the availability of strike benefits. If the record established that the parties were in year one of a three-year labor contract with a no-strike clause, I would agree that the controversy might be too speculative to warrant decision. Short of that situation, the impact on the collective bargaining relationship of the availability of welfare benefits to strikers may be quite real and immediate. But we simply do not know what the situation is because the plaintiffs were deprived of the opportunity of making a record in the district court. The analytical unsoundness of the majority's position is reflected in its reliance, in support of its mootness conclusion, on that very deprivation. The opinion states:

> "The lack of immediacy and solidity of interest necessary to support jurisdiction here is reflected in the atmosphere of abstraction, ambiguity, and conjecture surrounding this matter."

If there is abstraction and ambiguity it arises from the absence of a record. If there is conjecture, the conjecture is by the majority of this panel. Their conclusion that there is no collective bargaining relationship which may be affected by the availability of welfare benefits to strikers is entirely conjectural. Appellate decision making cannot be reduced to scholastic disputation about rules to be drawn from previously decided cases. It must first of all be grounded in facts. There is no more justification for mak-

ing a hypothetical or conjectural decision upon an issue of alleged mootness than upon an issue going to the merits.

This case can be regarded as having been made moot by the termination of the strike only if we construe the complaint as addressed to the protection of the integrity of the collective bargaining relationship only during the pendency of a strike. But it cannot fairly be so construed. Collective bargaining over contract terms more often than not goes on for months before a strike. Collective bargaining over grievances may go on continuously. The complaint seeks to unfetter the collective bargaining relationship from alleged interference by New Jersey. The relationship for which the protection of the court has been sought is a continuing one. *See NLRB v. Newark Morning Ledger,* 120 F. 2d 262, 267 (3d Cir.), *cert. denied,* 314 U. S. 693 (1941).

In the context of the protection of a continuing relationship perhaps only two of the many decisions discussed in the majority opinion are relevant, *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U. S. 275 (1946); *Bus Employees v. Missouri,* 374 U. S. 74 (1963).

In *Fishgold* a veteran was laid off by his employer in compliance with the seniority provisions of a collective bargaining agreement. He sued the employer for damages and for a declaratory judgment that his layoff was in violation of Section 8(c) of the Selective Training and Service Act of 1940, 50 U. S. C. App. § 301. The labor union intervened, taking a position in defense of the validity of contract seniority provisions. The district court awarded money damages to the veteran, and only the union appealed. Meanwhile, the one-year statutory veteran's preference period for the original veteran plaintiff's employment had expired. The Supreme Court held that the union, because of the ongoing relationship between it and the employer by virtue of the labor contract, had standing to appeal. Since the contract was still in ex-

istence, the case was not moot. *Fishgold* is, of course, only authority for the instant case by way of analogy. But the analogy is closer than in any of the cases upon which the judges in the majority rely.

Bus Employees, as the majority opinion points out, dealt with the validity of a Missouri statute which gave the governor of that state the authority to seize the facilities of a public utility in the event of a strike, and to operate them in the public interest. The statute was challenged on the same basis as is the New Jersey regulation on welfare benefits to strikers challenged here, interference with a relationship regulation of which has been preempted by paramount federal law. While the case was on appeal the governor terminated the seizure. Missouri then urged mootness, relying on *Oil Workers Unions v. Missouri,* 361 U. S. 363 (1960), a case involving the identical statute. The court declined to dismiss as moot, and held the Missouri statute unconstitutional. It distinguished *Oil Workers* because in that case both the labor dispute and the seizure had ended, whereas in *Bus Employees* the strike had not ended and the availability of the seizure device as an available means of terminating it had an ongoing effect. *Bus Employees,* again, is only analogous authority since the plaintiffs sought the protection of the right to strike, a right lawful under the National Labor Relations Act which Missouri attempted to make unlawful. But on the mootness issue the case is quite closely in point, for it recognizes that the availability of state interference can have an ongoing effect upon the collective bargaining relationship, and that a controversy over such availability is not moot, as long as the affected relationship exists.

The issues in this case are of considerable public interest, and likely to recur. Overanxiety on the part of the federal courts to find such cases non-justiciable is not

consistent with our judicial obligations. As Judge Coffin said in a similar context:

> "Although the strike against ITT was subsequently settled, the issue, we know from our own experience, has earlier vainly sought appellate review in this circuit and is likely again to be raised, bringing it close to the 'recurring question' category, where significant public rights are involved and court review ought not, if possible, be avoided. *See* So. Pac. Terminal Co. v. I. C. C., 219 U. S. 498, 515-516, 31 S. Ct. 279, 55 L. Ed. 310 (1911) and Marchand v. Director, U. S. Probation Office, 421 F. 2d 331 (1st Cir. 1970)." *ITT Lamp Division v. Minter, supra,* at 991.

We cannot without a record properly hold that this case is moot. At the same time, since there is no record, we cannot rule out the possibility that the situation of the parties has so changed as to render the case moot. The issues involved are complex and their proper resolution far from clear. *Compare ITT Lamp Division v. Minter, supra, with John Hancock Mutual Life Insurance Co. v. Commissioner of Insurance,* 349 Mass. 390, 208 N. E. 2d 516 (1965). I would remand the case to the district court for a hearing to determine first, the actual collective bargaining relationship between the parties, and next, in what way, factually, that actual relationship is affected, if at all, by the availability of welfare benefits to strikers. Only with such a record can we properly decide if there is still a genuine case or controversy, and, if so, how it should be resolved.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 71-1773/71-1775.

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; AND A. ROBERT SCHAEVITZ

v.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD; AND JUANITA E. DICKS; WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY
INTERVENOR: LOCAL 676, TEAMSTER UNION, ETC.
SUPER TIRE ENGINEERING COMPANY,
Appellant in No. 71-1773,

SUPERCAP CORPORATION,
Appellant in No. 71-1774,

A. ROBERT SCHAEVITZ,
Appellant in No. 71-1775.

(D. C. CIVIL ACTION No. 853-71)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Present: McLAUGHLIN, ADAMS and GIBBONS, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the appeals in these cases be, and the same are hereby dismissed as moot, and the cause remanded to the said District Court with directions to vacate its judgment, filed July 13, 1971, and to dismiss for the same reason, all in accordance with the opinion of this Court. Costs taxed against appellants.

ATTEST:

THOMAS F. QUINN,

Clerk.

November 22, 1972.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 71-1773, 774 AND 775.

SUPER TIRE ENGINEERING COMPANY, ET AL.,
Appellants,

v.

LLOYD W. McCORKLE, ET AL.,
Appellees.

Present: McLAUGHLIN, ADAMS and GIBBONS, *Circuit Judges.*

ORDER.

Amicus status in this appeal is hereby granted to the United States Chamber of Commerce.

The affidavit of Professor Northrup will be received and filed with the record.

BY THE COURT,
ARLIN M. ADAMS,
Circuit Judge.

Dated: November 22, 1972.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 71-1773, 71-1774, 71-1775.

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION AND A. ROBERT SCHAEVITZ,
Appellants,

v.

LLOYD W. McCORKLE, ET AL.

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* MCLAUGHLIN, VAN DUSEN, ALDISERT, ADAMS, GIBBONS and ROSENN, *Circuit Judges.*

The petition for rehearing filed by SUPER TIRE ENGINEERING COMPANY, SUPERCAP CORPORATION and A. ROBERT SCHAEVITZ in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

ARLIN M. ADAMS,
Judge.

Dated: December 20, 1972.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 71-1773, 71-1774, 71-1775.

SUPER TIRE ENGINEERING COMPANY,
SUPERCAP CORPORATION AND
A. ROBERT SCHAEVITZ,

Appellants,

v.

LLOYD W. McCORKLE, ET AL.

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* McLAUGHLIN, VAN DUSEN, ALDISERT, ADAMS, GIBBONS and ROSENN, *Circuit Judges.*

The petition for rehearing en banc of this Court's panel order of November 22, 1972, filed by Chamber of Commerce of the United States of America in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,
ARLIN M. ADAMS,
Judge.

Dated: December 20, 1972

SUPREME COURT OF THE UNITED STATES

No. A-941.

SUPER TIRE ENGINEERING COMPANY, ET AL.,
Petitioners,

v.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

UPON CONSIDERATION of the application of counsel for petitioner(s).

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 19, 1973.

/s/ WILLIAM J. BRENNAN, JR.,
Associate Justice of the Supreme Court of the United States.

Dated this 12 day of March, 1973

ORAL OPINION.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY.

CIVIL ACTION No. 853-71.

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; AND
A. ROBERT SCHAEVITZ,

Plaintiffs,

v.

LLOYD W. McCORKLE, ET ALS.,

Defendants.

Camden, New Jersey.
June 24, 1971.

Before: HONORABLE JOHN J. KITCHEN, *U. S. D. J.*

• • •

[20]

The Court: Gentlemen, as I understood our discussion before we came into Court, there was a desire to have this determined on the merits at this time. Is that right, Mr. Keene?

Mr. Keene: Yes.

The Court: Consolidated with the request for the injunction and so forth?

Mr. Keene: That's correct, sir.

The Court: Gentlemen, I have read for I don't know how many times, but I

[21]

have read again this I. T. T. Case, which has been referred to; and on the basis of that, the Court has determined not to take testimony. I accept the ruling of Judge Coffin's opinion in that case and I feel that that case, as I interpret it, is controlling, because I feel that any action in this matter such as those enumerated in the case and in which they said, they are going to be reoccurring, I feel, that such rulings or such testimony should be heard by Congress for whatever action they deem appropriate. On that basis, I am going to grant the motion to dismiss and of course, that will deny the injunction.

(Where upon the hearing was concluded.)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY.

CIVIL ACTION NO. 853-71.

SUPER TIRE ENGINEERING COMPANY; SUPER-CAP CORPORATION; AND A. ROBERT SCHAEVITZ,

Plaintiffs,

v.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY;

IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY;

FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD;

JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; AND

TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

ORDER.

This matter having come on for Final Hearing on the merits pursuant to F. R. C. P. 65(a)(2) on June 24, 1971;

And the Court having heard oral argument by counsel for all parties hereto;

And based upon existing law and for other good cause shown;

It is on this 13th day of July, 1971, ORDERED that plaintiffs' Motion for Preliminary Injunction be and the same hereby is dismissed;

It is FURTHER ORDERED that the Complaint filed in this matter be and the same hereby is dismissed without costs.

/s/ JOHN J. KITCHEN,
John J. Kitchen,
J. U. S. D. C.

July 13, 1971.

STATUTES INVOLVED.

United States Constitution.

ARTICLE VI.

Clause 2. Supreme Law of Land.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

National Labor Relations Act, 29 U. S. C. § 158.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

New Jersey Public Assistance Law

NJSA 44:8-107 et seq.

44:8-107. Short title.

This act may be cited as the "General Public Assistance Law."

44:8-108. Definitions.

As used in this act:

"Commissioner" means the Co-ordinator of the Department of Economic Development;

"Department" means the Department of Economic Development;

"Municipality" shall include any city, borough, township, town, village or municipality governed by a board of commissioners or an improvement commission;

"Public assistance" means assistance rendered to needy persons not otherwise provided for under the laws of this State, where such persons are willing to work but are unable to secure employment due either to physical disability or inability to find employment, and includes what is commonly called "relief" or "emergency relief";

"State aid" means State aid for public assistance or relief as in this act prescribed and provided for;

"Year" means calendar year.

* * *

44:8-114. Municipalities to provide public assistance; administration.

Every municipality shall provide public assistance to the persons eligible thereto, residing therein or otherwise when so provided by law, which shall be administered by a local assistance board according to law and in accordance with this act and with such rules and regulations as may be promulgated by the commissioner.

REGULATIONS.

M. A. 1.006
Rev. 3/57

State of New Jersey

Department of Institutions and Agencies

Division of Welfare—Bureau of Assistance

TITLE: REIMBURSEMENT

SUBJECT: EMPLOYABILITY AS A CONDITION OF ELIGIBILITY

A. *Citation of Statute and Constitution*

Chapter 156, P. L. 1947 (R. S. 44:8-108) defines reimbursable public assistance as "assistance rendered to needy persons not otherwise provided for under the laws of this State, *where such persons are willing to work* but are unable to secure employment due either to physical disability or inability to find employment."

The Constitution of New Jersey 1947, Article I, paragraph 19, guarantees that "Persons in private employment shall have the right to organize and bargain collectively."

B. *Interpretation and Policy*

It may be inferred from the quoted section of the statute that persons unwilling to work are ineligible for public assistance. However, for purposes of public administration, the phrase "unwilling to work" must be defined as objectively as possible. For this purpose, therefore, it is interpreted that a person may be considered unwilling to work only when all of the elements of either (1) or (2) following are present:

(1) He is physically and mentally capable of engaging in remunerative employment or self-employment; and

he refuses, without just and reasonable cause, to seek such employment or self-employment, or to make himself available for referral to, or consideration by prospective employers; OR

(2) He is physically and mentally capable of engaging in remunerative employment or self-employment; and such employment or self-employment is available to him; and he refuses, without just and reasonable cause, to accept such employment or engage in such self-employment.

At the same time, the effect of the Constitutional provision cited above must be considered. The Constitutional guarantee of the "right to organize and bargain collectively" implies the right of the individual to participate in a bona fide labor dispute as between the employer and the collective bargaining unit by which the individual is represented. Moreover, a "strike", when lawfully authorized and conducted, is recognized as an inherent and lawful element of the process of bargaining collectively and of resolving labor disputes. Accordingly, when an individual is participating in a lawful "strike," he may not be considered merely because of such participation, as refusing to work without just cause.

C. *Regulations*

Based on the foregoing statement of interpretation and policy, the following regulations are established:

1. Employability is a resource to be considered in determining eligibility for public assistance.

2. When it is clearly established that an individual is able to work, and that he refuses, without just and reasonable cause, to seek work, or to make himself avail-

able for referral to and consideration by prospective employers, he shall be deemed ineligible for public assistance.

3. When it is clearly established that an individual is able to work, that a specific job within his capabilities is available to him, and that there is no just and reasonable cause for a refusal to accept the job so available, if he nevertheless refuses to accept the employment, he shall be deemed ineligible for public assistance.

4. No individual shall be presumed to be unwilling to work, or to be wrongfully refusing to accept suitable employment, merely because he is participating in a lawful labor dispute.

5. An individual who is participating in a lawful labor dispute, and who is needy, has the same right to apply for public assistance, for himself and his dependents, as any other individual who is needy.

6. In the case of an applicant for public assistance who is participating in a lawful labor dispute, there shall be an investigation of need and other conditions of eligibility, and an evaluation of income and resources, in the same way and to the same extent as in all other cases. In such instances, "strike benefits" or other payments available to the individual from the labor union or other source, shall be considered a resource and shall be determined and accounted for.

7. The right of persons to bargain collectively with an employer does not imply the right to bargain collectively with the public assistance agency; and the right of individuals to apply for public assistance does not carry with it a right to apply collectively for public assistance through an agent or representative.

8. If an individual is found to be disqualified for public assistance because of wrongful refusal to seek or accept available employment (as provided in regulations #2 and #3 above), such disqualification shall not affect the eligibility of his spouse, minor children, or other persons in his household, if they are needy persons.

9. Assistance which is granted consistently with these regulations and all other eligibility conditions, to a needy person, will not be excluded from matching State aid merely because such person is engaged in a lawful labor dispute.

DEPARTMENT OF INSTITUTIONS AND AGENCIES

/s/ IRVING ENGELMAN
Irving Engelman, Chief
Bureau of Assistance

IE/MCRd
Approved
Elmer V. Andrews, Director
Division of Welfare

Official Regulation 1.006, revised 3/57
Destroy Regulation 1.006, revised 3/1/48

New Jersey Assistance for Dependent Children Law, NJSA 44:10-1 et seq.

44:10-1. Definitions.

As used in this act and for the purpose of the determination of eligibility to receive financial assistance under the provisions of this act, the following words shall have the following meaning, unless the context indicates another meaning:

(a) "Assistance for dependent children" means the assistance and other services to be extended under this act to or for needy dependent children and the parents and relatives with whom they are living for the following purposes:

(1) To provide for the care of needy dependent children in their own homes or in the homes of relatives, under standards and conditions compatible with decency and health.

(2) To help maintain and strengthen family life, and

(3) To help such parents or relatives to attain the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.

(b) "Bureau of Assistance" means the Bureau of Assistance of the Department of Institutions and Agencies.

(c) "Dependent child" means a child under the age of 18, or under the age of 21 and a student regularly attending school, college or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment, who

(1) Has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or, when living with both parents, has been deprived of parental support or care by reason of the unemployment of his father or the insufficient earnings of his parents, and

(2) Is living in New Jersey with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew or niece, in a place of residence maintained by one or more of such relatives as his or their home, and

(3) Is found, after due investigation and determination, according to standards and procedures established pursuant to this act, to be in need of financial assistance.

(d) "Parent or relative with whom a dependent child is living" means a person

(1) Who is related to the dependent child, in the manner prescribed in subsection (c)(2) of this section, and

(2) With whom the dependent child is living in a place of residence maintained by one or more of such relatives as his or their own home, and

(3) Who is found, after due investigation and determination, according to standards and procedures established pursuant to this act, to be in need of financial assistance.[1]

* * *

1. See footnote 3, in text of Petition, *supra*, with respect to New Jersey's election to no longer participate in the Unemployed Parent segment of the joint federal-State Aid to Families with Dependent Children program, 42 U. S. C. § 607.

Social Security Act of 1935, as Amended, 42 U. S. C. § 602 et seq.

§ 602. State Plans for Aid and Services to Needy Families With Children; Contents; Approval by Secretary.

(a) A State plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness; (5) provide (A) such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary to be necessary for the proper and efficient operation of the plan, and (B) for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community services aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency; and (6) provide that the State agency will make such reports, in such forms and containing

such information, as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports; (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; (8) provide that, in making the determination under clause (7), the State agency—

(A) shall with respect to any month disregard—

(i) all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or part-time student who is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment, and

(ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month (except that the provisions of this clause (ii) shall not

apply to earned income derived from participation on a project maintained under the programs established by section 632(b)(2) and (3) of this title); and

(B) (i) may, subject to the limitations prescribed by the Secretary, permit all or any portion of the earned or other income to be set aside for future identifiable needs of a dependent child, and (ii) may, before disregarding the amounts referred to in subparagraph (A) and clause (i) of this subparagraph, disregard not more than $5 per month of any income;

except that, with respect to any month, the State agency shall not disregard any earned income (other than income referred to in subparagraph (B)) of—

(C) any one of the persons specified in clause (ii) of subparagraph (A) if such person—

(i) terminated his employment or reduced his earned income without good cause within such period (of not less than 30 days) preceding such month as may be prescribed by the Secretary; or

(ii) refused without good cause, within such period preceding such month as may be prescribed by the Secretary, to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined by the State or local agency administering the State plan, after notification by him, to be a bona fide offer of employment; or

(D) any of such persons specified in clause (ii) of subparagraph (A) if with respect to such month the

income of the persons so specified (within the meaning of clause (7)) was in excess of their need as determined by the State agency pursuant to clause (7) (without regard to clause (8)), unless, for any one of the four months preceding such month, the needs of such persons were met by the furnishing of aid under the plan;

* * *

§ 606. Definitions.

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

(b) The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipient makes application for aid) medical care in behalf of any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the

needs of the relative with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parent and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home if such needs are taken into account in making the determination under section 602(a)(7) of this title) which do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual, but only with respect to a State whose State plan approved under section 602 of this title includes provision for—

(A) determination by the State agency that the relative of the child with respect to whom such payments are made has such inability to manage funds that making payments to him would be contrary to the welfare of the child and, therefore, it is necessary to provide such aid with respect to such child and relative through payments described in this clause (2);

(B) undertaking and continuing special efforts to develop greater ability on the part of the relative to manage funds in such manner as to protect the welfare of the family;

(C) periodic review by such State agency of the determination under clause (A) to ascertain whether conditions justifying such determination still exist, with provision for termination of such payments if they do not and for seeking judicial appointment of a guardian or other legal representative, as described in section 1311 of this title, if and when it appears that the need for such payments is continuing, or is likely to continue, beyond a period specified by the Secretary;

(D) aid in the form of foster home care in behalf of children described in section 608(a) of this title; and

(E) opportunity for a fair hearing before the State agency on the determination referred to in clause (A) for any individual with respect to whom it is made;

(c) The term "relative with whom any dependent child is living" means the individual who is one of the relatives specified in subsection (a) of this section and with whom such child is living (within the meaning of such subsection) in a place of residence maintained by such individual (himself or together with any one or more of the other relatives so specified) as his (or their) own home.

(d) The term "family services" means services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family, and such other services as will assist members of a family to attain or retain capability for the maximum self-support and personal independence.

(e) (1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age 21 who is (or, within such period as may be specified by the Secretary, has

been) living with any of the relatives specified in subsection (a) (1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

(B) such services as may be specified by the Secretary; but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

(2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate.

§ 607. Dependent Children of Unemployed Fathers; Definition.

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a) (2) of this title, who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with

standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a) (1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

(b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title—

(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—

(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

(B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and

(C) (i) such father has 6 or more quarters of work (as defined in subsection (d) (1) of this section) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d) (3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application for such aid; and

(2) provides—

(A) for such assurances as will satisfy the Secretary that fathers of dependent children as defined in subsection (a) of this section will be referred to the Secretary of Labor as provided in section 602(a) (19) of this title within thirty days after receipt of aid with respect to such children;

(B) for entering into cooperative arrangements with the State agency responsible for administering or supervising the administration of vocational education in the State, designed to assure maximum utilization of available public vocational education services and facilities in the State in order to encourage the retraining of individuals capable of being retrained; and

(C) for the denial of aid to families with dependent children to any child or relative specified in subsection (a) of this section—

(i) if, and for so long as, such child's father is not currently registered with the public employment offices in the State, and

(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States.

(c) Notwithstanding any other provisions of this section, expenditures pursuant to this section shall be excluded from aid to families with dependent children (A) where such expenditures are made under the plan with respect to any dependent child as defined in subsection (a) of this section, (i) for any part of the 30-day period referred to in subparagraph (A) of subsection (b)(1) of this section, or

(ii) for any period prior to the time when the father satisfies subparagraph (B) of such subsection, and (B) if, and for as long as, no action is taken (after the 30-day period referred to in subparagraph (A) of subsection (b)(2) of this section), under the program therein specified to refer such father to the Secretary of Labor pursuant to section 602(a)(19) of this title.

(d) For purposes of this section—

(1) the term "quarter of work" with respect to any individual means a calendar quarter in which such individual received earned income of not less than $50 (or which is a "quarter of coverage" as defined in section 413(a)(2) of this title), or in which such individual participated in a community work and training program under section 609 of this title or any other work and training program subject to the limitations in section 609 of this title, or the work incentive program established under part C;

(2) the term "calendar quarter" means a period of 3 consecutive calendar months ending on March 31, June 30, September 30, or December 31; and

(3) an individual shall be deemed qualified for unemployment compensation under the State's unemployment compensation law if—

(A) he would have been eligible to receive such unemployment compensation upon filing application, or

(B) he performed work not covered under such law and such work, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such unemployment compensation upon filing application.

New Jersey Assistance to Families of the Working Poor Law, NJSA 44:13-1 et seq.

44:13-1. Legislative findings.

The Legislature hereby finds and declares that it is in the public interest for the State to provide financial assistance to New Jersey families with children in which both parents are present in the home and who otherwise meet the eligibility criteria set forth in this act by virtue of inadequate income for the support of the family. The Legislature further finds that such families are a unique class, distinguishable in their composition and needs from other categories of persons benefited by other programs of assistance established by law. The Legislature further finds that such families should be entitled to receive the benefits available under the "New Jersey Medical Assistance and Health Service Act."

44:13-2. Establishment of program; administration.

There is hereby enacted by the State of New Jersey a program of assistance to be known as "Assistance to the Families of the Working Poor" which shall benefit all of the citizens of New Jersey meeting the eligibility provisions more particularly set forth in section 3 of this act. This program shall be administered by all of the county welfare boards of this State under the direction of the Commissioner of Institutions and Agencies as provided in this Title.

44:13-3. Definitions.

As used in this act and for the purposes of determining eligibility to receive financial assistance under this act, the following words shall have the following meanings:

a. "Assistance to the Families of the Working Poor" means the financial assistance and other services to be extended under this act to those families residing in New Jersey which consist of a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child under the age of 18 residing with them, who shall be either the natural child of both, the natural child of one and adopted by the other, or a child adopted by both, and have (i) no income or insufficient income and (ii) no other resources or insufficient other resources, where such absence or insufficiency of income or resources is not the result of a voluntary cessation of employment within 90 days prior to the date of application, or the result of a voluntary assignment or transfer of property within one year prior to the time of application for the purpose of qualifying for public assistance;

b. "Adjusted gross income" means the total of monthly unearned income and monthly earned income of all employed individuals in the family, except for those individuals whose income is required to be disregarded under the provisions of this subsection, less the first $60.00 earned by each person whose income is included in adjusted gross income. In computing the income of a family as defined in this act there shall be disregarded the *earned* income of any minor child under 16, and the income of a minor child under 18 if he or she is attending on a full time basis an accredited educational institution;

c. "Insufficient income" means that the adjusted gross income of the family is less than 66⅔% of the standard applicable to the size of the applicant family established by the Division of Public Welfare for the program of aid to dependent children authorized under P. L. 1959, c. 86 (C. 44:10-1 et seq.);

d. "Other resources" means all property and assets, as otherwise defined by the Division of Public Welfare for the program of aid to dependent children authorized under P. L. 1959, c. 86 (C. 44:10-1 et seq.), legally or beneficially owned by a member or members of the families which are or can be readily made available for the use of the family;

e. "Insufficient other resources" means that other resources are insufficient as determined by standards set forth by the Director of the Division of Public Welfare pursuant to P. L. 1959, c. 86 (C. 44:10-1, et seq.); and

f. "Commissioner" shall mean the Commissioner of Institutions and Agencies.

44:13-4. Application for assistance; form; signature; other financial assistance from state; failure of father to improve employment situation.

a. A family wishing to make application for assistance under the provisions of this act shall do so by securing from the county welfare board offices an application, the form of which shall be prescribed by the Division of Public Welfare. Said application shall be completed and signed by both parents, except that if a parent is unavailable to sign the application for reasons beyond the family's control one signature will suffice. In that event the non-signatory parent shall be required to annex his signature as promptly as he is available for such purpose. Said application shall state that the amounts of assistance received by the applicants, if they are eligible, shall constitute a debt to the State of New Jersey as required by the provisions of this act.

b. No family or member thereof for whom financial assistance is being paid under the provisions of this act

shall receive, during the same period, any other financial assistance from the State or any political subdivision thereof with respect to any maintenance requirements or other items for which allowance is made in the assistance grant paid pursuant to this act.

c. No family shall be entitled to receive financial assistance under this act if the father refuses, without good cause, to accept employment, better employment or training for employment or better employment.

44:13-5. Powers of commissioner; rules, regulations and orders; obtaining maximum federal aid.

Under general policies established by the State Board of Control consistent with the provisions of this act, the commissioner is authorized, directed and empowered to issue, or to cause to be issued by the appropriate departmental officers or agencies, in accordance with the "Administrative Procedure Act" (P. L. 1968, c. 410), all necessary rules and regulations and administrative orders, and to do or cause to be done all other acts and things necessary to implement the provisions of this act. He shall endeavor to obtain the maximum possible Federal financial participation with respect to all or any portion of the program established by this act, insofar as it is feasible to do so consistently with the provisions of this act.

44:13-6. Duties of commissioner.

The commissioner is directed to do the following:

a. Require that the program of assistance provided by this act shall be uniformly administered throughout all the counties of this State;

b. Require that all families wishing to make application for assistance under this program shall have the

opportunity to do so, in the manner described in this act and that assistance shall be furnished with reasonable promptness to eligible families;

c. Require that safeguards be provided restricting the use or disclosure of information concerning applicants and recipients of aid under the provisions of this act;

d. Arrange for appropriate services and cooperation with other agencies so that maximum opportunities for employment or improved employment and training for employment will be available to recipients of assistance under this program;

e. Prescribe the conditions under which financial assistance will be denied to any family in which the father refuses, without good cause, to accept employment, better employment, or training for employment or better employment;

f. Provide a procedure whereby an applicant for or a recipient of assistance under the provisions of this act shall have an opportunity to appeal an action or decision of a county welfare board to the Division of Public Welfare of the Department of Institutions and Agencies. Such appeal shall be taken within 90 days from the date of the action or decision of the county welfare board upon which the applicant or recipient bases his appeal.

LIBRARY
SUPREME COURT, U. S.

No. 72-1554

FILED
JUN 8 1973
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1972

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO INTERVENE

MILTON SMITH,
General Counsel,

O. F. WENZLER
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H Street, N.W.
Washington, D.C.

GERARD C. SMETANA,
925 South Homan Avenue
Chicago, Illinois 60607

JERRY KRONENBERG
BOROVSKY, EHRLICH & KRONENBERG
120 South La Salle Street
Chicago, Illinois 60603

Of Counsel:
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D. C.

© The Scheffer Press, Inc.—(312) 263-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO INTERVENE

The Chamber of Commerce of the United States of America ("the Chamber"), by its attorneys, hereby moves this Court for leave to intervene in this proceeding and, in support thereof, states the following:

1. The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. The Chamber regularly represents the interests of its member-employers, including many located within the State of New Jersey, in important labor relations matters

vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions and is one of the basic reasons for its existence. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation both before this Court and numerous of the Circuit Courts of Appeals. Illustrative recent cases before this Court in which the Chamber has so participated include *N.L.R.B.* v. *The Boeing Company, et al.*, ... U.S. ....., Nos. 71-1417, 1607; *N.L.R.B.* v. *International Van Lines*, ... U.S. ....., No. 71-895; *N.L.R.B.* v. *Granite State Joint Board*, ... U.S. ....., 34 L. Ed. 2d 422 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *Burns International Security Services, Inc.*, ... U.S. ....., 80 LRRM 2225 (1972); *H.K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970).

3. The issues presented in this case are of particular import to the Chamber's members. With respect to the question of mootness presented for review here, should this Court decline to grant the instant petition and thus leave standing the decision below, one of the principal functions performed by the Chamber for its members would be greatly curtailed; similarly, one of the major benefits reaped from membership in the Chamber would be removed. For the Chamber frequently litigates in its members' interests cases presenting recurring issues of significance where the immediate dispute before the courts may neither require nor permit relief to the named parties to the dispute, but where a repetition of the challenged conduct will exert major harm to the Chamber's members. The holding below would substantially inhibit the Chamber from engaging in such conduct since many of the cases in which the Chamber would seek to perform its representative role would be deemed moot. Intervention is sought at this time because it was only in the decision of

the circuit court below that the finding of mootness was made which is so prejudicial to the Chamber and its members.

4. With respect to the merits of the instant dispute, which the court below deemed moot, the question as to whether a state may subsidize one party to a labor dispute by providing welfare benefits to his striking employees is of such apparent concern to the employer-members of the Chamber as to obviate extended discussion of the Chamber's continuing interest in that question. Suffice it to state that the Chamber has participated in the litigation of that question in various lower courts, is the only party which has consistently done so and is thus uniquely able to contribute to its proper resolution.[1]

5. By virtue of its continuing concern with the substantive question of the propriety of welfare payments to striking employees, the Chamber both constitutes the real party in interest in such cases and satisfies the fundamental criterion of non-moot cases,—the existence of a viable and interested combatant prepared fully to litigate the issues involved. The Chamber's intervention here is therefore appropriate and affirmatively prevents this case from becoming moot and evading review.

Accordingly, the Chamber moves this Court for leave to intervene in this proceeding.

---

[1] In the various cases in the lower courts raising this substantive question in which the Chamber has participated, that participation has been as a party. Thus, the Chamber was permitted to intervene, over the opposition of other parties, in both *Grinnell Corp.* v. *Hackett*, ... F. 2d ....., 82 LRRM 2986 (CA1, 1973) and *Russo* v. *Kirby*, 453 F. 2d 548 (CA2, 1971); the Chamber's motion to intervene is pending in *Francis* v. *U.S. Chamber of Commerce*, CA4, Civil No. 72-1537; and, over opposition, the Chamber has been permitted to participate as a party-plaintiff in pending proceedings in *Dow Chemical Co. and the Chamber of Commerce of the United States of America* v. *Taylor* (E.D., Mich., Civil No. 38644).

ARGUMENT IN SUPPORT OF MOTION TO INTERVENE

In its decision below, the circuit court held, in reliance upon the supposed holding of this Court in *Oil Workers Local 8-6* v. *Missouri*, 371 U.S. 363 (1960), that in cases arising in the field of labor law the termination of the dispute between the immediate parties rendered the matter moot for all purposes, regardless of considerations which would, in other fields, nonetheless result in a decision on the merits. Thus, the court below would find irrelevant *in labor law matters only* the fact that the issue presented is a recurring one, that it may be inherently evasive of review, that a failure to decide it will result in continuing confusion and jeopardy in future cases, that the issue involves a matter of great conceptual and practical importance, that its non-resolution may have lingering effects and that the parties then before the court are prepared fully and competently to litigate the case.

Wholly apart from the importance of obtaining both a resolution of the correctness of the described holding below and a clarification as to whether this Court's decisions in such "mootness" cases as *Moore* v. *Ogilvie*, 394 U.S. 814 (1969), *United States* v. *Grant*, 345 U.S. 629 (1953), and *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911) also apply to cases arising under the labor laws, the Chamber should be permitted to participate in such deliberations as a party in view of its special interest in and potential jeopardy from the rule which would result. The Chamber's special status results from the following circumstances:

First, the decision of the court below would deprive the Chamber of the opportunity to perform for its members important representative functions which it now performs.

On behalf of its members' interests, the Chamber frequently participates in the litigation of significant cases involving the labor laws whose impact upon the future welfare of its members is thought to be substantial. While the Chamber does on occasion bring such suits in the first instance, more commonly it acts as an intervenor or an *amicus curiae* in suits brought by others. This is a major component of the services which the Chamber performs and is one of the strong inducements for membership. Since, in cases presenting important and recurring questions of law, the specific dispute between the parties may be resolved before the cases reach the appellate level at which the Chamber so frequently participates, the question as to whether a case necessarily becomes moot upon such a resolution has an enormous impact on the Chamber's performance of its representative functions. On the mootness question presented in the instant petition, therefore, the Chamber has a more vital interest than do the named parties to the suit.

Second, since the Chamber limits its judicial participation to those cases which, by their very nature, will often recur and whose issues have the most far-reaching and serious consequences to its members' future welfare, therefore, the decision below, if permitted to stand, will greatly prejudice the interests of the Chamber's members. They will, in that eventuality, unnecessarily be deprived of judicial guidelines by which to gauge their conduct and preserve their rights, although, in any other field of law, those guidelines would be afforded and the case not held moot. Thus, the Chamber's members, more than the named parties to this case, have a vital stake in its outcome. With respect to the substantive issue involved in this case, for example, while it is possible that the petitioner, Supertire Engineering Co., may be again faced with the issue of the

right of a state to make welfare payments to its striking employees, it is a certainty that many of the Chamber's members will repeatedly be confronted by that question and its severe practical implications.

Third, the Chamber should be granted intervention because it is a real party in interest in this case and its participation prevents the case from being "moot." Both the majority and the dissent below noted that the Chamber and the Teamsters Union, neither being named or formal parties to the suit, were the real parties in interest whose presence in the case ". . . does suggest an ongoing interest in the issue raised in this litigation." In *Grinnell Corp.* v. *Hackett,* ..... F. 2d ....., 82 LRRM 2986 (CA 1, 1973) (Petition for writ of certiorari filed May 5, 1973), another case involving the propriety of a state's payment of welfare for strikers, the First Circuit specifically concluded that it was the involvement of the Chamber and the certainty that its members would be affected by recurrences of the problem, which rendered that case non-moot. Thus, one of the recognized criteria for the existence of a justiciable controversy,—viable combatants anxious and prepared fully to litigate the issues,—is provided in this case by the presence and participation of the Chamber. See *Fishgold* v. *Sullivan Drydock and Repair Corp.,* 328 U.S. 275 (1946), holding that the presence of an intervenor with an independent interest precluded mootness.

Fourth, the Chamber is a particularly appropriate participant in this case, which raises an important question concerning the nature of the doctrine of mootness, since it participated and thus had a role in the decision of other cases on mootness with which the decision below is in conflict. *Grinnell Corp.* v. *Hackett, supra; I.T.T. Lamp Division* v. *Minter,* 435 F. 2d 989 (CA 1, 1970); *Terminal*

Freight Cooperative Assn. et al. v. *Solien*, 440 F. 2d 124 (CA 8, 1971). In each of these cases, in which the Chamber either intervened or participated as *amicus curiae*, the courts accepted the argument, in a labor law context, that the existence of an important public question which will recur and would otherwise tend to evade review warranted judicial resolution.[2]

Finally, absent intervention in this proceeding, it would be impossible for the Chamber to challenge the mootness conclusion reached below. While the Chamber could bring an independent action to test the propriety of welfare payments to strikers, such an action would neither necessarily test nor resolve the important mootness question presented in the petition in this case which so seriously jeopardizes both the continuing functioning of the Chamber and its members' legitimate interests.

---

[2] According to the court in *Terminal Freight*, a decision in irreconcilable conflict with the opinion below:

> "We do not think this case is moot because the probability of repetition of unlawful secondary boycott activity by the Union in the instant case is sufficient to satisfy the "mere probability" test articulated in *United States* v. *W. T. Grant Co.* . . . In our view, a case is justiciable 'if there is a probability that the challenged conduct will recur and it is possible that the challenging party will be affected should recurrence take place' . . . We believe that the doctrine of mootness should not be used to perpetually frustrate review of issues of public importance arising in otherwise justiciable cases. . ." (Quoting Comment, 83 Harv. L. Rev. 1672, 1692)

Wherefore, for the foregoing reasons, the Chamber respectfully requests that it be granted leave to intervene herein.

Respectfully submitted,

MILTON SMITH,
General Counsel,

O. F. WENZLER
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H Street, N.W.
Washington, D.C.

GERARD C. SMETANA,
925 South Homan Avenue
Chicago, Illinois 60607

JERRY KRONENBERG
BOROVSKY, EHRLICH & KRONENBERG
120 South La Salle Street
Chicago, Illinois 60603

Of Counsel:
COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D. C.

LIBRARY
SUPREME COURT, U. S.

No. 72-1554

Supreme Court, U. S.
FILED
JUN 20 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ,
Petitioners,

vs.

LLOYD W. MCCORKLE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

HERBERT G. KEENE, JR., ESQUIRE
STRADLEY, RONON, STEVENS & YOUNG
1300 Two Girard Plaza
Broad Street and South Pennsylvania
Philadelphia, Pennsylvania 19102

LAWRENCE M. COHEN, ESQUIRE
LEDERER, FOX & GROVE
111 West Washington Street
Chicago, Illinois 60602

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ,
Petitioners,

vs.

LLOYD W. MCCORKLE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

Since the submission of the Petition for Writ of Certiorari, another panel of the Third Circuit has issued a decision on mootness in a labor context which directly conflicts with the decision of that Court in the instant case. In this case, although the Court recognized that "review may be unavailable in the majority of cases such as this", the panel majority concluded that the present controversy was moot since there was a "settlement of the underlying labor dispute". App. 2 Pet., pp. A15,

A20. In *Pittsburgh Newspaper Printing Pressman's Union No. 9* v. *Pittsburgh Press Company*, —— F2d ——, 83 LRRM 2349 (May 25, 1973), the underlying labor dispute had also been resolved and the relief sought already granted. The Court held, nevertheless, that the appeal was "not moot because the issues involved are 'capable of repetition yet evading review', *Roe* v. *Wade*, 41 L.W. 4213, 4217 (1973); *Avco Corp.* v. *Local 787, Autoworkers*, 459 F2d 968, 974, 80 LRRM 2290 (Third Cir. 1972); *Pacific Maritime Ass'n.* v. *International Longshoremen's Union*, 454 F2d 262, 79 LRRM 2116 (Ninth Cir. 1971)."

Review of the instant case is, therefore, warranted not only to resolve the conflict between the decision below and decisions of other Courts of Appeals and that Court (see Petition, pp. 5-13), but to resolve the conflict in the Third Circuit between the instant case and *Printing Pressman* as well.

Respectfully submitted,

HERBERT G. KEENE, JR., ESQUIRE
STRADLEY, RONON, STEVENS & YOUNG
1300 Two Girard Plaza
Broad Street and South Pennsylvania
Philadelphia, Pennsylvania 19102

LAWRENCE M. COHEN, ESQUIRE
LEDERER, FOX & GROVE
111 West Washington Street
Chicago, Illinois 60602

Supreme Court, U. S.
FILED
JUL 9 1973
MICHAEL RODAK, JR., CLERK

LIBRARY
SUPREME COURT, U. S.

No. 72-1554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ,
Petitioners,

vs.

LLOYD W. McCORKLE, ET AL.,
Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Third Circuit

---

MEMORANDUM IN LIEU OF BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TOMAR, PARKS, SELIGER, SIMONOFF & ADOURIAN
By: Robert F. O'Brien
400 Market Street, Camden, N.J. 08102

In The

Supreme Court of the United States

October Term, 1972

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, ET AL.,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For the Third Circuit

MEMORANDUM IN LIEU OF BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Teamsters Local 676, requests this Court to consider this Memorandum in Lieu of Brief in Opposition to Petition for a Writ of Certiorari filed by Petitioner, Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz.

I FEDERAL JURISDICTION DOES NOT EXIST IN THIS MATTER

This matter was initially brought before the United States District Court for the District of New Jersey predicated upon federal jurisdiction allegedly existent under 28 U.S.C. § 1331 and 28 U.S.C. § 1337. The United States Court of Appeals for the Third Circuit in Footnote 5a to its Opinion, noted it believed jurisdiction existent under 28 U.S.C. § 1331. The Court of Appeals did not discuss whether jurisdiction was existent under § 1337. It is submitted, however, serious questions exist as to whether, in fact, federal jurisdiction is present in this matter as alleged by Petitioner. The United States Court of Appeals Second Circuit has had occasion to consider the matter involving welfare benefits to strikers. *Russo v. Kirby*, 453 F.2d 540 (2nd Cir., 1971). In that case, the Second Circuit was faced with a situation wherein

a labor union brought suit against certain New York state officials requesting that striking employees be granted welfare benefits. The United States District Court considered the matter on its merits. The Second Circuit, however, reversed finding that jurisdiction did not exist under Section 1331 or 1337. The Court held that no 1337 jurisdiction was existent since the facts involved in the dispute were insufficient to conclude that there was a federal cause of action present under any federal law. Additionally, the Court held that there was no jurisdiction under 1331 since no individual claim of the striking employees exceeded $10,000 and aggregation of all claims of all striking employees was impermissable. The Court cited *Snyder v. Harris*, 394 U.S. 332 (1969) It is respectfully suggested that the decision of *Russo v. Kirby* is equally applicable to the dispute here and that jurisdiction does not lie under any federal statute and that therefore a Writ of Certiorari should not be granted in this matter.

II THE CASE BEFORE THE COURT IS MOOT AND THEREFORE THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

The Petitioner argues that this matter has not been mooted by the passage of time. However, factually it is undisputed that the strike giving rise to the granting of welfare benefits ended before the trial court completed its action in dismissing the case. The trial court acted under the authority of the Decision of the United States Court of Appeals for the First Circuit in *ITT Lamp Division v. Minter*, 435 F.2d 989 (1st Cir., 1970) cert. denied 402 U.S. 933 (1971). Indeed in this matter Teamsters Local 676 alleged that the strike terminated prior to the hearing being held before the United States District Court on the Employer's request for injunctive relief (See Petitioner's Appendix at Page A-3). It is, therefore, factually clear at the time of the important parts of this matter, that the strike which had given rise to the case, was over and that employees were about to return to work. It is, therefore, suggested that factually, therefore, Employer Petitioner is seeking review in a case which cannot be considered viable under any circumstances since no one was any

longer on strike nor any longer receiving welfare benefits at crucial times of the initial litigation. The Employer Petitioner argues strongly that the case herein involved is of extreme importance and that the test should be "whether the question presented is an important one, which, unless resolved, is likely to recur." (Petition for Writ of Certiorari Page 6). It is submitted that this is not the proper test of whether, in fact, a case is moot within the meaning of the case or controversy provision of the United States Constitution which gives rise to United States court jurisdiction. The issue is whether, in fact, there are parties who actually have between them a real dispute existent at the time the case is being decided by a court. The test of mootness, as proposed by the Employer, is simply a lifting of a rationale articulated in a 1911 case before the United States Supreme Court. See, *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911). It is submitted that the comments made in that case relative to whether a dispute is "capable of repitition yet evading review" is not the proper test for determining mootness; rather it is submitted that when the immediate dispute between the parties is ended because the challenged activity has ceased, then mootness sets in. The United States Court of Appeals for the Third Circuit so recognized that the activity here in dispute, receipt of welfare benefits by employees during an economic strike, had in fact terminated while the District Court litigation was occurring thus making the matter moot. In support of the Court of Appeals conclusion, the Court cited *Oil Workers Local 8-6 v. Missouri*, 361 U.S. 363 (1960). It is submitted that this case is the proper precedent and sets out proper mootness precedent in a case involving a labor dispute. There, the underlying labor dispute giving rise to the challenged state action had already been resolved.

Also on point in this regard is the case of *Street Employees Division v. Missouri*, 374 U.S. 74 (1963). That case too viewed the dispute as viable only if the underlying labor dispute giving rise to the challenged state action had not been ended. It is submitted that the *Oil Workers* case and the *Street Employees Division* case clearly spell out applicable principles of mootness which must be applied to the facts of this case. Particularly appropriate are the comments of Mr. Justice Stewart delivered in the *Oil Workers* case wherein he cited from the case of *Brownlow v. Schwartz*, 261 U.S. 216:

"Any judgment of ours at this late date 'would be wholly ineffectual for want of a subject matter on which it could operate and if affirmed would ostensibly require something to be done which had already taken place. A reversal would ostensively avoid an event which had already passed upon recall. One would be as vain as another. To adjudicate a cause which no longer exists is a proceeding which this court has uniformly declined to entertain.'"

8-6 Oil Workers v. Missouri,
361 U.S. 363 at 371

It is, therefore, respectfully suggested that a Writ of Certiorari should not be granted in this matter.

III A GRANT OF WRIT OF CERTIORARI IS INAPPROPRIATE AT THE CURRENT TIME

The matter before the Court is one involving a subject matter inappropiate for review at the current time. The United States Department of Health, Education and Welfare has currently under consideration various alternative proposed regulations to deal with the question of welfare benefits for striking employees. The Department of Health, Education and Welfare proposed several alternate regulations and invited public comment on same. Those alternate proposals are set forth at 45 CFR Part 233. A copy of same is attached hereto.

The Health, Education and Welfare Department has received public comments on these regulations and is currently considering which of its alternatives it will be codifying and promulgated. The proposals have been made as a result of the suggestion of the Decision in the case *Francis v. Davidson*, 340 F. Supp. 351 (D. Maryland), Affirmed Per Curiam, 409 U.S. 904 (1972). That case, too, involved a determination as to whether striking employees are entitled to welfare benefits and the Three Judge District Court deciding the matter was of the Opinion that the striking employees were entitled to welfare benefits

In view of these recent developments by the Health, Education and Welfare Department, it is respectfully suggested that

the current time is particularly inappropriate for the Court to grant the petition for a Writ of Certiorari.

Respectfully submitted,
TOMAR, PARKS, SELIGER,
SIMONOFF & ADOURIAN
Attorneys for Respondent Local 676
By: Robert F. O'Brien

PROPOSED RULE MAKING
Social and Rehabilitation Service
(45 CFR Part 233)
COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS
Dependent Children of Unemployed Fathers

Notice is hereby given that the regulation set forth in tentative, alternative form is proposed by the Administrator, Social and Rehabilitation Service, with the approval of the Secretary of Health, Education, and Welfare. Both alternatives would amend § 233.100 (a) (1), which provides a Federal definition of unemployed father under the AFDC program in terms of hours of work.

In applying the existing regulation, the Department policy has been to permit a State, at its option, to use a definition of unemployed father which imposes additional conditions relating to the reason for the unemployment, e.g., the State definition might exclude a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law. In Davidson v. Francis, the Supreme Court on October 16, summarily affirmed the judgement of the district court which held, in effect, that while the Secretary has broad authority to define an unemployed father for purposes of section 407 of the Social Security Act, the existing Federal regulation provides only an hours-of-work test, and thus prohibits a State from excluding fathers who meet this test but are disqualified for unemployment compensation.

Accordingly, the proposed alternative A below would amend the regulation to make the prior Department policy explicit, by stating the options which are permitted to the States in defining

an unemployed father. Alternative B, on the other hand, would amend the regulation to make clear that the hours-of-work test is intended as the exclusive definition of unemployed father, so that States may not have definitions which impose added conditions. This would be a change in Department policy, but would be consistent with the way that the existing regulation has been interpreted by the courts.

Davidson v. Francis attracted broad interest from States, assistance recipients, and industry and labor groups. The regulations are proposed in alternative form to give all those who are interested full information as to the various courses of action which are being considered.

Prior to the adoption of the proposed regulation, consideration will be given to any comments, suggestions or objections thereto which are submitted in writing to the Administrator, Social and Rehabilitation Service, Department of Health, Education and Welfare, 330 Independence Avenue SW., Washington, DC 20201, within a period of 30 days from date of publication of this notice in the FEDERAL REGISTER. Comments received will be available for public inspection in room 5120 of the Department's offices at 301 C Street SW., Washington, DC, on Monday through Friday of each week from 8:30 to 5 p.m. (area code 202—963-7361).

(Sec. 1102, 49 Stat. 647, 42 U.S.C. 1302)

Dated: December 4, 1972

JOHN D. TWINAME,
Administrator, Social and Rehabilitation Service.

Approved: December 21, 1972.

ELLIOT L. RICHARDSON,
Secretary.

ALTERNATIVE A

Section 233.100 (a) (1) of Chapter II of Title 45 of the Code of Federal Regulations is revised to read as follows:

§233.100 Dependent children of Unemployed fathers

(a) *Requirements for State plans.* * * *

(1) Include a definition of an unemployed father which shall apply only to families determined to be needy in accordance with the provisions in § 233.20. Such definition must include any father who:

(i) Is employed less than 100 hours a month; or

(ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hour standard for the 2 prior months and is expected to be under tthe standard during the next month; except that, at the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.

ALTERNATIVE B

Section 233.100 (a) (1) of Chapter II of Title 45 of the Code of Federal Regulations is revised to read as follows:

§ 233.100 Dependent children of unemployed fathers

(a) *Requirements for State plans.* * * *

(1) Include a definition of an unemployed father which shall apply only to families determined to be needy in accordance with the provisions in §233.20 and shall include any father who:

(i) Is employed less than 100 hours a month, or

(ii) Exceeds that standard for a particular month, if his work is intermittent and the excess is of a temporary nature as evidenced by the fact that he was under the 100-hours standard for the 2 prior months and is expected to be unkler the standard during the next month.

This shall be the exclusive definition of an unemployed father.

(FR Doc. 73-33 Filed 1-2-73, 8:45 A.M.)

LIBRARY
SUPREME COURT, U. S.
FILED
JUL 23 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; AND A. ROBERT SCHAEVITZ,
Petitioners,

vs.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD; JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; INTERVENOR DEFENDANT: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

REPLY TO MEMORANDUM IN OPPOSITION OF TEAMSTERS LOCAL 676

HERBERT G. KEENE, JR.
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102
LAWRENCE M. COHEN
111 West Washington Street
Chicago, Illinois 60602
Attorneys for Petitioners

Of Counsel:
STRADLEY, RONON, STEVENS & YOUNG
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102
LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; AND A. ROBERT SCHAEVITZ,
Petitioners,

vs.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD; JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; INTERVENOR DEFENDANT: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

REPLY TO MEMORANDUM IN OPPOSITION OF TEAMSTERS LOCAL 676

The memorandum is submitted to show the error of the various contentions made by Respondent Teamsters Local 676 in its memorandum in opposition:[1]

1. The public respondents, by letter dated June 15, 1973, advised the Clerk of the Court that they did not intend to file a brief in opposition.

1. The memorandum in opposition (pp. 1-2) argues that, although the Court of Appeals found federal jurisdiction based on 28 U. S. C. § 1331 (App. to Pet., p. A3, n. 5a), neither that section nor 28 U. S. C. § 1337 confer jurisdiction in the instant case. This argument is specious. Jurisdiction under either Section 1331[2] or 1337[3] has repeatedly been found in situations such as that *sub judice*. *Russo* v. *Kirby*, 453 F. 2d 540 (2nd Cir., 1971), the sole authority relied on by the Teamsters, is inapposite. The plaintiffs in *Russo* were striking employees seeking the payment of the state welfare payments notwithstanding that no federal law "create[d] a cause of action" for such benefits (453 F. 2d at 551) and, in addition, that their individual claims of less than $10,000 could not be aggregated. Here, conversely, the plaintiff is a single employer, with an individual claim exceeding $10,000, whose complaint is grounded on the federally-conferred right to participate in collective bargaining free from state interference. Such a claim is "a substantial one" whose correctness, as this Court has recognized in a similar situation, "is a question which goes to the merits . . ." *American Federation of Labor* v. *Watson*, 327 U. S. 582, 591 (1946).

2. The memorandum in opposition (pp. 2-4) also argues that the appropriate test for determining mootness is not, as the petition (p. 6) argues, "whether the question presented is an important one which, unless resolved, is likely to recur", but,

2. See, e.g., *Almacs, Inc.* v. *Hackett*, 312 F. Supp. 964 (D. R. I, 1970); *General Electric Company* v. *Callahan*, 294 F. 2d 60, 63 (1st Cir., 1961); *Oil, Chemical and Atomic Workers International Union Local 5-283* v. *Arkansas Louisiana Gas Company*, 332 F. 2d 64, 65 (10th Cir., 1964); *Cab Operating Corp.* v. *City of New York*, 243 F. Supp. 550, 552 (S. D. N. Y., 1965); *Grand Rapids City Coach Lines* v. *Howlett*, 137 F. Supp. 667, 671 (W. D. Mich., 1955); *Delaware Coach* v. *Public Service Commission*, 265 F. Supp. 648, 654 (D. Del., 1967).

3. See, e.g., *Almacs, Inc.* v. *Hackett*, 312 F. Supp. at 967; *General Electric Company* v. *Callahan*, 294 F. 2d at 63, n. 3; *I. T. T.* v. *Minter*, 435 F. 2d 989 (1st Cir. 1970), *cert. den.*, 402 U. S. 933 (1971).

rather, "whether, in fact, there are parties who actually have between them a real dispute existent at the time the case is being decided by a court." This contention presumes that, by virtue of *Oil Workers Local 8-6* v. *Missouri*, 361 U. S. 363 (1960), and *Street Employees Division* v. *Missouri*, 374 U. S. 74 (1963), the "capable of repetition yet evading review" mootness rule of *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498 (1911), no longer retains vitality or, at least, vitality with respect to labor disputes. There are several fatal defects in this assertion.

First, as the numerous cases cited in the petition (p. 6, n. 3 and 4), and in particular *Roe* v. *Wade*, 93 S. Ct. 705 (1973), demonstrate, the *Southern Pacific* principle is a firmly imbedded doctrine as applicable today as when formulated. *Oil Workers* and *Street Employees*, for the reasons set forth in the petition (pp. 6-8 and n. 5), do not carve out an exception to this doctrine for cases arising in a labor context.

Second, there are numerous parties in this proceeding, i.e., the State of New Jersey, the Chamber of Commerce of the United States as well as the petitioner and Teamsters Local 676, who continue to dispute the constitutionality of granting state welfare assistance to strikers. It is that question, not the underlying labor controversy, which constitutes the "real dispute" in this case. There is, in short, as the Court of Appeals acknowledged (App. to Pet., p. A14), "an on-going interest in the issue raised in this litigation." Even under the test proposed by the Teamsters, therefore, the instant case should not have been deemed moot.

Finally, in this case, in contrast to the quoted language (memorandum, pp. 3-4) of *Oil Workers* (361 U. S. at 371), "there is here a subject matter"—the state payment of welfare benefits to strikers—on which a judgment could clearly operate —and "something to be done"—barring such payments in the future as violative of federal labor policy—which has not "already taken place." And surely, since New Jersey's grant of welfare assistance to strikers is virtually a continuing daily occurrence, if the Court of Appeals had reversed the District

Court's affirmance of that practice, it would not have merely "avoid[ed] an event which had already passed beyond recall."

3. The Teamsters' memorandum (pp. 4-7) also argues that, since the Department of Health, Education and Welfare has been considering a revision of § 233.100(a)(1) of its regulations governing the Aid to Families of Dependent Children (AFDC) program, grant of certiorari is inappropriate. This contention disregards the fact that the present action challenged not only the payment of AFDC benefits to strikers but also the grant of assistance to strikers under two entirely state-financed programs, Aid to Families of the Working Poor, N. J. S. A. 44:13-1, *et seq.*, and General Public Assistance, N. J. S. A. 44:8-107, *et seq.* See the decision below at App. to Pet., p. A2, n. 2. None of these programs would be affected in any way by HEW's proposed regulations. Cf. *Merriam* v. *Kunzig*, 476 F. 2d 1233, 1239 (3d Cir. 1973). Moreover, HEW has now made a determination, effective July 12, 1973, to adopt proposed Alternative A (see memorandum, pp. 5-6) which expressly abstains, according to Secretary Weinberger, from a "federal mandate either to include or exclude strikers . . ." and leaves this option to each individual state. White Collar Report, No. 851, p. A-11 (BNA; July 13, 1973). The underlying question in this case, accordingly, even with respect to the AFDC program, continues to remain undecided and to warrant, as described in the petition (pp. 10-13), review by this Court.

Respectfully submitted,

HERBERT G. KEENE, JR.
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102

LAWRENCE M. COHEN
111 West Washington Street
Chicago, Illinois 60602
Attorneys for Petitioners

Of Counsel:

STRADLEY, RONON, STEVENS & YOUNG
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102

LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

SUPREME COURT, U. S.

FILED

AUG 2 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPER-CAP CORPORATION, and A. ROBERT SCHAEVITZ,

Petitioners,

v.

LLOYD W. MCCORKLE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

STATEMENT OF ATTORNEY GENERAL OF NEW JERSEY ON BEHALF OF RESPONDENTS, LLOYD MC CORKLE, IRVING ENGELMAN AND FRED STRENG

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,
Attorney for Respondents, McCorkle, Engelman and Streng,
State House Annex,
Trenton, New Jersey 08625

VIRGINIA LONG ANNICH,
Deputy Assistant Attorney General,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPER-CAP CORPORATION, and A. ROBERT SCHAEVITZ,

Petitioners,

v.

LLOYD W. McCORKLE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

STATEMENT OF ATTORNEY GENERAL OF NEW JERSEY ON BEHALF OF RESPONDENTS, LLOYD MC CORKLE, IRVING ENGELMAN AND FRED STRENG

On June 15, 1973, subsequent to the filing of the petition for writ of certiorari, the Attorney General of New Jersey, on behalf of respondents Lloyd McCorkle, Irving Engelman and Fred Streng, notified the Court that the

State did not intend to file a brief in opposition to the petition. On July 8, 1973, a memorandum in lieu of brief in opposition to the petition was filed by respondent Teamsters Local Union No. 676. On July 16, 1973, the Attorney General of New Jersey was advised by the Clerk that the Court had directed a printed response to be filed.

This case arose out of a complaint filed in the United States District Court (D. N. J.) seeking declaratory and injunctive relief on federal constitutional and statutory grounds and on state statutory grounds against the operation of three New Jersey welfare programs which do not automatically exclude strikers from benefits thereunder. The Attorney General defended the action in the district court on its merits, urging that the challenged welfare programs are neither violative of the state nor federal constitutions or statutes and that the identical issue was previously determined in the State's favor in *ITT Lamp Division* v. *Minter,* 435 F. 2d 989 (1st Cir. 1970), *cert. denied,* 402 U. S. 933 (1971). Upon a denial of injunctive relief and a dismissal of the complaint, the plaintiffs appealed to the United States Court of Appeals for the Third Circuit and on appeal the Attorney General again defended on the aforestated bases.

On November 22, 1972, the Court of Appeals issued the decision which is the subject of the instant petition for writ of certiorari. This decision completely eschews the merits of the case to which all of the Attorney General's defenses had been directed and is premised solely on the proposition that the issue presented to the court was moot and that therefore dismissal was warranted.

Accordingly, the Attorney General of the State of New Jersey does not deem it appropriate to take a position with respect to the petition for writ of certiorari since at

no time during the course of the instant proceedings did the Attorney General urge the doctrine of mootness which is the basis of the lower court's decision. The Attorney General has concluded that there is no reason for the State to assume an adversary role with respect to this issue for the first time at this juncture. It should be noted, moreover, that it was the respondent Union which briefed and argued the mootness point in the courts below and it was upon its urging that the court accepted this view of the case. The respondent Union has also opposed the petition for certiorari and filed a memorandum covering the mootness issue. Accordingly, this is not a case such as *Boynton* v. *Virginia,* 364 U. S. 454 (1960) in which the court is faced with a unilateral submission on an issue of great importance. Therefore, there is no factor which would point in favor of the Attorney General taking a position on this question.

Respectfully submitted,

George F. Kugler, Jr.,
Attorney General of New Jersey,
Attorney for Respondents, McCorkle, Engelman and Streng.

Virginia Long Annich,
Deputy Assistant Attorney General,
Of Counsel.

LIBRARY
SUPREME COURT, U. S.

FILED

No. 72-1854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; and A. ROBERT SCHAEVERS,
Petitioners,
v.
LLOYD W. MCCORKLE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONERS

MILTON A. SMITH
General Counsel

OTTO F. WENZLER
Labor Relations Counsel
Chamber of Commerce of the United States of America
1615 H Street, N.W.
Washington, D.C. 20006

GERARD C. SMETANA
225 South Hermon Avenue
Chicago, Illinois 60607

JERRY KROPKOWSKI
BOROVSKY, EHRLICH & KROPKOWSKI
120 South La Salle Street
Chicago, Illinois 60603

Of Counsel:

CRUZ, ZULUETA & RAYMUNDO
2011 Eye Street, N.W.
Washington, D.C.

WILSON - EPES PRINTING CO., INC. - 737-8000 - WASHINGTON, D.C. 20001

INDEX

Interest of the Chamber of Commerce 1

Reasons for Granting the Writ 2

I. The Nature of the Problem 2

II. Courts' Treatment of the Mootness Issue Has Been Inconsistent and Affords No Effective Guidance to Potential Litigants 5

A. The Differing Variables Employed by the Courts 5

B. Discussion of the Variables Courts Have Employed in Mootness Cases and an Alternative Proposal 13

III. There Exists An Irreconcilable Conflict Among the Circuits as Well as Between the Circuits and This Court's Decisions 21

Conclusion 25

AUTHORITIES CITED

Cases:	Page
Almacs v. *Hackett*, 311 F. Supp. 964 (D.R.I., 1970)	20
Association of Data Processing Service Organizations, Inc. v. *Camp*, 397 U.S. 150	24
Bakery Sales Drivers Union v. *Wagshal*, 333 U.S. 437, 422 (1948)	6, 21
Barlow v. *Collins*, 397 U.S. 159	24
Boggess v. *Berry Corp.*, 233 F. 2d 389, 391 (CA 9, 1956)	14
Brockington v. *Rhodes*, 396 U.S. 41 (1969)	9, 10
Campbell Soup Co. v. *Martin*, 202 F. 2d 398, 399, (CA 5, 1953)	14
Carroll v. *President & Commissioners of Princess Anne County*, 394 U.S. 175 (1968)	16
Commercial Cable Co. v. *Burleson*, 250 U.S. 360 (1919)	7
Dow Chemical Co. v. *Taylor*, —— F. Supp. ——, 57 F.R.D. 105 (1972)	20
Dyer v. *SEC*, 266 F. 2d 33, 47 (CA 8), cert. denied, 361 U.S. 835 (1959)	14
Ex Parte Baez, 177 U.S. 378 (1900)	17
Flast v. *Cohen*, 392 U.S. 83, 95 (1968)	4, 18, 19
Francis v. *Davidson*, 340 F. Supp. 351 (D. Mich.), aff'd per curiam, 409 U.S. 904 (1972)	20
Friend v. *United States*, 388 F. 2d 579, 581 (CA DC, 1967)	14
Gray v. *Sanders*, 372 U.S. 368 (1968)	8, 10
Grinell v. *Hackett*, —— F. 2d ——, 82 LRRM 2986 (1973)	15, 20
Hall v. *Beals*, 396 U.S. 45 (1969)	9, 10
ITT v. *Minter*, 435 F. 2d 989 (CA 1, 1970)	20
Local 1976, United Brotherhood of Carpenters and Joiners, et al. v. *N.L.R.B.*, 357 U.S. 93	21
A. L. Mechling Barge Lines v. *United States*, 368 U.S. 324 (1961)	7
Moore v. *Ogilvie*, 394 U.S. 814 (1969)	9, 10, 11, 12, 13, 14, 18

AUTHORITIES CITED—Continued

Page

N.L.R.B. v. *Globe Wernicke Systems Co.*, 336 F. 2d 589 (CA 6, 1964) 22
N.L.R.B. v. *Local 65, Carpenters Union*, 318 F. 2d 419 (CA 3, 1963) 22
N.L.R.B. v. *Local 182, IBT*, 314 F. 2d 53 (CA 2, 1963) 22
N.L.R.B. v. *March Supermarkets, Inc.*, 327 F. 2d 109 (CA 7, 1963) 22
N.L.R.B. v. *Mexia Mills, Inc.*, 339 U.S. 563, 567 (1950) 6, 21
N.L.R.B. v. *Plumbers Union of Nassau County, Local 457, et al.*, 299 F. 2d 497 (CA 2, 1962) 22
N.L.R.B. v. *Raytheon Co.*, 398 U.S. 25 (1970) 6, 21
N.L.R.B. v. *United Hatters, et al.*, 286 F. 2d 950 (CA 4, 1961) 22
Oil Workers, Local 8-6 v. *Missouri*, 361 U.S. 363 (1960) 6, 7, 8, 9, 10, 11, 12, 13, 17, 19, 21
Pittsburgh Newspaper Printing Pressmen's Union No. 9 v. *Pittsburgh Press Co., et al.*, —— F. 2d ——, 83 LRRM 2349 (decided May 29, 1973) 23
Russo v. *Kirby*, 453 F. 2d 548 (CA 7, 1971) 20
Samoff v. *IAM, Lodge No. 1*, 420 F. 2d 952 (CA 3, 1969) 23
Sibron v. *New York*, 392 U.S. 40 (1968) 11, 12, 13, 14, 18
Singer Mfg. Co. v. *Wright*, 414 U.S. 696 (1968) 17
Southern Pacific Terminal Co. v. *ICC*, 219 U.S. 498 (1911) 10, 11, 12, 14, 18
Street Employees Div. 988 v. *Wisconsin Employment Relations Board*, 340 U.S. 416, 418 (1951) 14
Street Employees Div. 1287 v. *Missouri*, 374 U.S. 74 (1963) 7
Terminal Freight Cooperative Assn. et al. v. *Solein*, 440 F. 2d 124 (CA 8, 1971) 23
United States v. *W. T. Grant Co.*, 345 U.S. 629, 623 (1953) 5, 6, 7, 8, 9, 10, 11, 12, 14, 16, 17, 24

AUTHORITIES CITED—Continued

	Page
United States v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897)	17, 18
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579, 594 (1952)	4
Miscellaneous:	
Sidney A. Diamond, Federal Jurisdiction to Decide Moot Cases, 94 U. Pa. L, Rev. 125 (1946)	3, 11
Jaffe, The Citizen As Litigant In Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. Rev. 1033 (1968)	16
"Moot" Administrative Orders, 53 Harv. L. Rev. 628, 630 (1940	15
Note, Cases Moot on Appeal: A Limit on the Judicial Power, 103 U. Pa. L. Rev. 772 (1955)	3, 8
Note, Moot Cases on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672 (1970)	3, 8, 12, 20, 24
United States Constitution, Article III, Section 2	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; and A. ROBERT SCHAEVITZ,
Petitioners,

v.

LLOYD W. MCCORKLE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONERS*

INTEREST OF THE CHAMBER OF COMMERCE

The interest of the Chamber of Commerce is set forth at pp. 1-3 of the accompanying "Motion of the Chamber of Commerce of the United States for Leave to Intervene."

---

* On June 8, 1973, the Chamber filed a motion for leave to intervene in this proceeding. Consent to its intervention was received from all parties to this case with the exception of Teamsters Local Union No. 676, which interposed no objection to the Chamber's motion. Should the Chamber's motion for leave to intervene not be granted, the Chamber's brief should alternatively be considered as a brief *amicus curiae* since, pursuant to Rule 42, consent from all parties to this case has been obtained for the filing of a brief *amicus curiae*.

REASONS FOR GRANTING THE WRIT

The instant case presents an issue of enormous importance for the efficient functioning of the judicial system. It is, moreover, an issue as to which no prospective litigant and no court has been afforded meaningful or reliable guidance. On the contrary, the question whether a case has become moot,—a question which can arise to plague any party in any case at any time with respect to any issue,—has produced a wide range of differing views, differing tests and differing results. Predictably, there has resulted a conflict in the circuits which cannot rationally be reconciled. Indeed, both the conflict and the confusion are so clear, that the court below expressly urged this Court to address itself to the problem. Accordingly, this Court's guidance in the formulation of appropriate rules is needed and warranted. This need is particularly urgent in the area of labor relations with which the instant case is concerned because of the unusual degree of inconsistency and conflict afflicting mootness decisions in this field.

I. The Nature of the Problem

The narrow question presented here is whether a case arising under the labor laws becomes moot and should not therefore further engage the judicial process when the immediate dispute which gave rise to it, although of a recurring nature involving matters of public importance, becomes resolved during the process of review.

In resolving this question, the generally cited bases for the mootness doctrine itself afford only limited assistance. In its broadest sense, mootness is one of the doctrines by which a court determines whether or not a matter before it may be properly adjudicated. It is a limitation on judicial power. Justiciability, an ill-defined concept relied upon to determine the scope and limitations of the judicial power, is often thought of as a Consti-

tional stricture imposed by the "case" or "controversy" requirement.[1] However, the terms "case" or "controversy" are themselves vague and inherently capable of varying interpretation,[2] so that to say that a matter is not justiciable because it does not present a "case" or "controversy" is devoid of useful meaning. It is perhaps for this reason that mootness problems, which arise because the conduct complained of has ceased prior to appeal but is likely to recur, have posed a conceptual difficulty that has failed to evoke a consistent or predictable response.[3]

Aside from imprecise Constitutional limits, the *policy* bases for the mootness doctrine similarly offer limited assistance. Those bases have been described as a need to economize judicial endeavor and need to assure the fullest litigation of the issues,—an objective presumably best guaranteed by an existing "controversy."[4] In fact, both criteria are suspect. If an issue is of a recurring nature whose potential effect reaches many prospective plaintiffs or defendants, the greatest judicial economy will result from a decision which will put the issue to rest and obviate much future litigation. If the nature of the recurring issue involved is one which is inherently likely to be resolved prior to a reviewing court's decision on the merits, then a failure to decide it despite such a resolution will only result in proliferating litigation in which each case in turn is likely to become "moot" while the underlying dispute continues to avoid judicial scrutiny. Such a result produces the antithesis of "judicial econ-

---

[1] U.S. Const., Art. III, Sec. 2.

[2] *Note*, Cases Moot on Appeal: *A Limit on the Judicial Power*, 103 U. Pa. L. Rev. 772 (1955); *Note, Moot Cases on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672, (1970).

[3] See Sidney A. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125 (1946).

[4] Note, 103 U. Pa. L. Rev. 772.

omy." Similarly, issues of importance whose continuing future effects may be anticipated may well be more earnestly litigated by those, such as associations of potentially affected members, who foresee an impact on them of those future effects than by directly involved parties who may never see the problem again. That is, there is no inherently necessary connection between the existence of an unresolved dispute and a thorough and competent litigation of the issues.

How, then, should the determination be made as to whether a given case should engage the judicial process? Former Chief Justice Warren, in *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968), stated that justiciability is a concept designed to "limit the business of federal courts to questions presented in an adversary context and in a form capable of resolution through the judicial process." [5] This functional view of justiciability suggests that the conceptual problems involving application of the mootness limitation to the type of case here under consideration may best be resolved and consistency be achieved by analyzing justiciability in terms of the needs and objectives of the appellate judicial process rather than, for

---

[5] Justice Frankfurter, concurring in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 594 (1952) expressed a similar view in language which emphasized the amorphous quality of the concept.

> "Judicial power can be exercised only as to matters that were the traditional concern of the courts at Westminster, and only if they arise in ways that to the expert feel of lawyers constitute 'cases' or 'controversies.' Even as to questions that were the staple of judicial business, it is not for the courts to pass upon them unless they are indispensably involved in a conventional litigation. . . ."

What is the relationship between what may once have been "traditional" to what is now, in a vastly changed time, appropriate? How does one codify the "expert feel" of lawyers? And to the extent that the legal system adjusts to the needs of an ever more complex society, can the notion of "conventional litigation" remain constant?

example, in terms of the identity of those who seek to litigate the issues or whether a specific instance of a general and continuing controversy has been resolved by the parties.

Fundamentally, that appellate judicial process requires only that degree of adverseness of interest between litigants as will assure both the effective functioning of the adversary system and the effective resolution of issues of public importance. However, in making mootness determinations, courts have evolved a variety of theories which are in no way consonant with each other. We submit, with reference to the two requirements set forth above, that (1) clarity and uniformity in the application of the mootness doctrine can be accomplished without compromising the objectives and needs of sound judicial policy; and (2) the instant case is an appropriate vehicle for accomplishing this desired result.

II. Courts' Treatment of the Mootness Issue Has Been Inconsistent and Affords No Effective Guidance to Potential Litigants.

A. *The Differing Variables Employed by the Courts.*

In determining whether a case which involves an important and recurring question becomes "moot" when the immediate parties have adjusted their personal dispute prior to definitive judicial consideration of the issue presented, or when relief to the contending parties is otherwise inappropriate, courts have created inconsistent and artificial distinctions which have produced confusion where clarity is needed.

In *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953), one of the most often cited decisions in this area, the defendants in an anti-trust suit voluntarily ceased the conduct complained of prior to final judicial review. The "mere possibility" that the challenged conduct might again recur was held to be sufficient to insure the presentation and vigorous litigation of issues

necessary to proper adjudication and prevent the case from being "moot". This Court stated:

> "[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. . . . A controversy may remain to be settled in such circumstances, . . . e.g., a dispute over the legality of the challenged practices. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." (Citations and footnote omitted.)

This proposition had been stated previous to, as well as subsequent to, *Grant*.[6] But it has not, however, been uniformly applied nor does its expressed rationale explain other decided cases.

Grant, however, involved a *governmental* challenge to private conduct that had ceased prior to review, as did the authorities referred to in footnote 6, *supra*. The "mere possibility" of recurrence which precluded a finding of mootness there has not uniformly been applied to otherwise similar situations where it is *private* parties who challenge governmental conduct. Illustrative is *Oil Workers, Local 8-6* v. *Missouri*, 361 U.S. 363 (1960), the case upon which the lower court relied in finding the instant matter moot. In *Oil Workers*, a case brought by private parties, the State of Missouri seized certain struck facilities during emergency circumstances and enjoined any future strike. The Court there held that a repetition of that conduct was merely "speculative," and consequently held the case moot. But is there a difference between the "mere possibility" of recurrence and a "speculative" recurrence? It does seem clear that so long

---

[6] *Bakery Sales Drivers Union* v. *Wagshal*, 333 U.S. 437, 442 (1948); *NLRB* v. *Mexia Mills, Inc.*, 339 U.S. 563, 567 (1950); *NLRB* v. *Raytheon Co.*, 398 U.S. 25 (1970).

as one may speculate about recurrence,—i.e., it is not impossible,—then there is at least a "mere possibility" that the questioned conduct will be repeated. Curiously, in a subsequent case the same conduct involved in *Oil Workers* was repeated pursuant to the same alleged authority,[7] illustrating that even when a future similar injury to claimed interests is only "speculative" it remains "possible." In any event, it would appear that the same faint likelihood of recurrence which prevents a finding of mootness in suits brought by the government has resulted in findings of mootness in suits brought against the government by private parties.

The conceptual basis for this disparate treatment may result from an unstated assumption that a private party has an insufficient stake in a recurrence of conduct involved in his suit, conduct to which he might never again be subjected, to warrant reliance upon him to constitute an effective and interested litigant for the future. In cases such as *Grant*, on the other hand, where the government challenges private conduct in its law-enforcement function, the government's future adverse interest may be relied upon; that is, it will continue to enforce the same statute and rule in the same manner against future violators. According to this analysis, in suits brought by

---

[7] *Street Employees Div. 1287* v. *Missouri*, 374 U.S. 74 (1963); see, also, an earlier case, *Commercial Cable Co.* v. *Burleson*, 250 U.S. 360 (1919), which involved a seizure by the Postmaster General of the cable company's property during World War I. The possibility that a seizure might recur was held insufficient to afford the necessary personal stake. See, also, *A. L. Mechling Barge Lines* v. *United States*, 368 U.S. 324 (1961) where an ICC order was attacked because it was made without a supporting hearing or findings. The Commission promised that it would make findings in the future, but insisted it was not required to hold hearings. The case was held moot because the new practice of giving findings "*may* lead the Commission to provide for a hearing—at least under some circumstances." *Id.*, at 331. These cases, brought by *private parties* to protest government conduct, represent an avoidance or rejection of the "mere possibility" test.

private parties, the avoidance of mootness requires a greater likelihood of recurrence than "mere possibility". At least one student of this Court's opinions has so concluded.[8]

Unfortunately, this analysis explains only a portion of the relevant cases. Thus, in *Gray* v. *Sanders*, 372 U.S. 368 (1968), this Court expressly applied the "mere possibility" test articulated in *Grant* to a *private* challenge of governmental conduct. *Sanders* was a voter class action challenging a Georgia state statute governing primary elections. The election officials did not follow the statutory plan for the primary in question, and the election was held. In holding the case not moot, this court applied the *Grant* test. The meaning of that case is not entirely clear, however; while the terminology followed *Grant*, the certainty that the Georgia voters would be adversely affected by any return to the challenged plan would presumably also satisfy the impliedly more stringent *Oil Workers* criteria.

Adding to the difficulty of assessing the import of *Sanders* is the contention, according to the court below and at least one legal scholar,[9] that the explanation for the *Sanders* case lies, instead, in the fact that election cases constitute a separate sub-group for mootness purposes. Under that view the relevant variables to be examined in mootness cases has swelled: Is the Government involved? Who is the plaintiff? What is the degree of likelihood of recurrance of the challenged conduct (differing in effect depending upon who the plaintiff is)? And what kind of case is involved?

As the variables employed by courts proliferate, it can be seen that the area begins to take on a needless and

[8] This explanation for the described disparate treatment appears to be adopted in *Note*, 83 Harv. L. Rev. 1672 (1970).

[9] Note, 103 U. Pa. L. Rev. 772.

burdensome complexity. Moreover, this Court has never expressly held election cases to represent a separate class and an analysis of such cases yields no obvious answer. *Moore* v. *Ogilvie*, 394 U.S. 814 (1969) involved a private party's challenge to the validity of a statute whose provisions were interpreted by state authorities effectively to deprive the challenging party of an opportunity to run for elective office. By the time the case reached this Court the election had already taken place. Nonetheless the case was held not moot. This Court could not realistically say that the challenged conduct would with certainty affect the challenging party in the future. On the contrary, one could only "speculate" whether he would again run for elective office. Rather, the case was deemed non-moot because it involved an important public question which would affect *other* similar private parties in the future since the same governmental agency would presumably continue to interpret the same statute in the same manner. Either *Moore* is an illustration of a separate sub-group of mootness case or,—by avoiding reliance on the *Grant* and *Oil Workers* terminology and focusing instead on the likelihood of future injury to other then-unaffected private parties,—*Moore* effected a change in mootness law generally.

In contrast to *Moore*, which involved an inherently likely recurring effect of the challenged conduct on a group which might or might not include the plaintiff himself, this Court declined to review the merits of two other election cases, *Brockington* v. *Rhodes*, 396 U.S. 41 (1969), and *Hall* v. *Beals*, 396 U.S. 45 (1969). *Brockington* and *Hall* involved situations in which the complaining party sought to have his name placed on the ballot as a candidate for a particular election (*Brockington*), and sought to be permitted to vote in a particular election (*Hall*), but was prevented from doing so pursuant to the operation of a statute which had subse-

quently been amended. By the time these cases reached this Court, the statutory amendments had been effected and the specific elections involved had been conducted. These cases were held to be moot since a repetition of the kind of injuries complained of could not recur in view of the statutory amendments. That is, in practical terms, no conceivable interest of either the individual complaining party or any others similarly situated could possibly be infringed in a similar manner in the future.

Reading the *Moore*, *Brockington* and *Hall* cases together, one may well deduce that this Court has effected a departure from the various tests previously followed in *Grant*, *Oil Workers* and *Sanders* and now relies, in mootness cases presenting important public questions, on whether it is *possible* that certain challenged conduct will recur to the *private* plaintiff or the class of persons to which the plaintiff belongs. Conversely, the former cases may be read as merely creating an additional basis for deciding a case on its merits when the future jeopardy to that class is "inherently likely" even though the prospective jeopardy to the private plaintiff himself may be merely "speculative." Finally, one may read *Moore*, assuming again that it is not merely representative of a special sub-group of cases, to give more specific meaning to *Oil Workers* in defining the degree of likelihood of recurrance which avoids mootness when *private* parties bring suit.

Nor do these authorities and possibilities exhaust the variables which courts' decisions have relied upon in determining whether cases are moot. The various approaches discussed above, which are based on assessments of probability of future effect, are further confused when the challenged conduct is deemed "capable of repetition, yet evading review." In *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911), this Court employed the quoted language as a basis to uphold a *private* challenge

to governmental conduct where there was no certainty or even inherent likelihood—but only a "mere possibility" that the challenging party would again be subjected to an injury such as he was then challenging. Indeed, the Court's focus was not at all on the degree of predictable future jeopardy to the plaintiff but rather on the need of the judicial system for a resolution of a problem which would otherwise continue to escape judicial scrutiny. It should also be noted that to still another legal scholar the doctrine of *Southern Pacific* is said to be restricted to only those cases which involve self-perpetuating situations without regard to the identity or nature of the plaintiff and without regard to *his* specific problem.[10] In either event, *Southern Pacific* was concerned with the needs of the judicial system for means by which to resolve problems; it was not primarily concerned with any requirement to satisfy the criteria relied upon in the other mootness cases discussed *supra*.

The reasoning of *Southern Pacific* would also seem to underscore this Court's decision in *Sibron* v. *New York*, 392 U.S. 40 (1968). That was a criminal case in which a private challenge was mounted to an alleged improper police search. The Court's conclusion of non-mootness in that case could not be said to trace to a concern that the challenging party was "inherently likely" to be again affected by the same wrongful conduct or that the probability of such a recurrance was, as to him, more than "speculative." Rather, the Court was concerned that the substantive issues presented in the case had a great potential impact on others and, unless adjudicated, would continue to evade judicial review.

Whatever the difficulty of reconciling the latter two decisions with *Moore*, *Oil Workers* and the "mere possibility" test of *Grant*, the task is compounded by the view

---

[10] Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125 (1946).

of at least one commentator [11] that criminal cases such as *Sibron*, like election cases, constitute an independent area whose mootness rules may not be imported to the analysis or resolution of such issues in other areas of the law.

Coming now to the instant proceeding, the confusion present here represents in microcosm the problems of the entire area. The underlying substantive question is one of substantial public importance, involving the propriety of a State's payment of public welfare funds to striking employees. Since strikes and threats of strikes will continue to occur, States will therefore continue to make the challenged welfare payments and parties will continue to act on the basis of the assumption that such payments may be made should a strike be called,—all to the disruption of parties' continuing bargaining relationships,—therefore the problem will recur with certainty. While there is at least a "mere possibility" that the issue will again confront the immediate parties (*Grant*), there is an "inherent likelihood" (*Moore*) that the class of persons, i.e. employers, to which the *private* plaintiff belongs will be affected by a recurrance. Since the duration of a strike is unlikely to be sufficiently protracted to survive the appellate process, the question presented is short term in nature, "capable of repetition, yet evading review." (*Southern Pacific*). Yet the court below, relying on *Oil Workers*, dismissed the case as being moot because the specific strike which gave rise to the entire action has terminated.

While recognizing that the law of mootness has undergone substantial liberalization and that the instant case would not appear to be moot on the strength of recent decisions such as *Moore*, the court nonetheless held it moot on the premise that in *labor relations cases*, the discontinuance of the challenged conduct necessarily re-

---

[11] Note, 83 Harv. L. Rev., *supra*.

sults in mootness. Thus the court below seeks to segregate still another area from the mainstream of mootness law and create yet one more independent sub-group. Moreover, the court below would render the mootness law in labor cases unique in that it would be *only* in such cases that the discontinuance of the underlying dispute automatically rendered a matter moot irrespective of other variables employed in other cases or other areas of the law. *Oil Workers* cannot reasonably be read to warrant such a result; nothing in that case requires a distinction between the mootness rules in labor cases and those which are appropriate in any other category or type of case.

Accordingly, adding to the confusion of the superabundance of tests and variables which may be derived from prior decisions of the courts in mootness cases, the court below adds a further basis for legal distinction.

From the viewpoint at least of a potential litigant, this is a situation which invites clarification and the resulting adoption of simpler, more encompassing rules.

B. *Discussion of the Variables Courts Have Employed in Mootness Cases and an Alternative Proposal.*

The various approaches which courts have used to determine whether one has a sufficient interest in the resolution of an issue, as divorced from its particular factual context, to prevent a finding of mootness have yielded the described uncertainty. They afford no rational basis for determining whether a case will be fully, competently or vigorously litigated. There is no warrant in logic or sound policy for applying one test in election cases such as *Moore* or criminal cases such as *Sibron*, applying a wholly different test in labor disputes such as *Oil Workers*, a third test when the government challenges private action, and a fourth test when a private party acts as plaintiff. There is no assurance that the self-interest necessary to achieve vigorous litigation will obtain in one

type of case rather than another and the assessment of the plaintiff's *personal* stake in terms of probability of recurrence of challenged conduct does not explain the court's adjudication of issues of public importance,—all of which militates in favor of granting certiorari in order to produce a needed clarification.

This public interest aspect is inherent in *Southern Pacific*, *Moore* and *Sibron*. It forms the basis for courts' need to determine issues of compelling importance which might otherwise evade review. Thus, where the issues raised involve significant questions that ought to be resolved, the requirement of probability of effect has been adjusted to allow resolution. Further, a number of lower federal courts have apparently adopted a public interest exception where, even though a case would be otherwise moot, the issues are of sufficient importance that they compel judicial resolution.[12] If the issues raised in a case are sufficiently important that they affect a broad category of persons and are likely to recur, there is no sound basis for rejecting an appeal because the appellant is unable to demonstrate for a certainty that a recurrence will affect him.[13]

---

[12] See, e.g. *Friend* v. *United States*, 388 F. 2d 579, 581 (CADC, 1967); *Dyer* v. *SEC*, 266 F. 2d 33, 47 (CA 8), *cert. denied*, 361 U.S. 835 (1959); *Boggess* v. *Berry Corp.*, 233 F. 2d 389, 391 (CA 9, 1956); *contra*, *Campbell Soup Co.* v. *Martin*, 202 F. 2d 398, 399 (CA 5, 1953). While this Court has indicated the relevance of the public interest in mootness determination, see, e.g., *Grant*, *supra*; *Moore*, *supra*; *Sibron*, *supra*, it has not expressly relied on the "public interest" as the sole basis for determining the question of mootness. *Street Employees Div. 998* v. *Wisconsin Employment Relations Board*, 340 U.S. 416, 418 (1951).

[13] The "public interest" component of the mootness doctrine has had great appeal to commentators in this area:

> "Not easy to weight, [the public interest in an adjudication on the merits] has seemed to some courts so pressing . . . as to justify a decision on the merits despite the fact that the decision could have no substantial effect on the parties who

The nature of the "interest" which a plaintiff should be required to possess in an issue to overcome a suggestion of mootness when relief in his case is otherwise inappropriate should be determined without reference to the continuum of probability-of-future-effect which courts today use as a test. That is, whether a recurring issue should be resolved by the courts ought not to depend upon the need for courts to measure the shades of differences between situations where such recurrence is "speculative," or "merely possible," or "probable," or "inherently likely" or "certain." Rather, it should be recognized that since self-interest is the motive which insures the proper functioning of the adversary judicial process, the fact that the appellant seeks to expend the time, money and effort to prosecute an appeal constitutes adequate assurance that he will litigate the issues with vigor. His self-interest may be based upon his own appraisal of the probability that a recurrence of the conduct complained of will affect him adversely. Perhaps it may be based on an identity of interest with those similarly situated. In some instances it may reflect an association's efforts to protect its members' interest from future jeopardy.[14] In any event, recognition of this principle reflects the realities of much present day litigation chal-

---

originally raised the question and that its usefulness would, as a result, be largely confined to the creation of precedent." (Citations omitted.) (Note, *"Moot" Administrative Orders*, 53 Harv. L. Rev. 628, 630 (1940).

[14] That such associational participation on its members' behalf demonstrates an interest sufficient to overcome objections to the adverseness principle was apparently recognized by the First Circuit in *Grinnell* v. *Hackett*, —— F. 2d ——, 82 LRRM 2986 (1973), which involved the same underlying substantive issue as is presented by the instant case. In *Grinnell* the Chamber was allowed to intervene, and thus prevent mootness, because it represented "many other employers . . . , as to at least some of whom the issue is certain to recur." *Id.*, at 2989-90.

lenging governmental action and, rather than diminishing the quality of litigation, serves to enhance it.[15]

Recognition of the legal adequacy of the personal stake of an appellant who, for whatever reason, perceives a sufficient self-interest to warrant prosecuting an appeal, does not destroy the necessary adversity required for vigorous litigation. Where the issue is important and there is a possibility of recurrence of the disputed conduct, the government, as defender of its actions, has an equally sufficient interest in presenting a well-argued case as it does when it is functioning as prosecutor;[16] it is surely just as important that the government refrain from unlawful conduct as it is that private persons do so. Since any unlawful activity engaged in by the government in the administration of a public law is bound to affect a large class of people and thus raise important issues, vindication of the public interest by private parties should not depend on the uncertainty engendered by tests of relative probability of recurrence. An even-handed and consistent application of the *Grant* test to all plaintiffs in all areas of the law would accomplish this and would involve no greater risk to the adverseness principle that this Court is already assuming under that test in its current and arguably more restricted sphere.

---

[15] This interest has been recognized by Professor Jaffe in his argument that "ideological" plaintiffs who challenge governmental action merely as concerned citizens should be accorded standing. See, Jaffe, *The Citizen As Litigant In Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033 (1968).

[16] When the challenged conduct is engaged in by the government, it is more than likely to recur absent a judgment condemning it as unlawful. The possibility that the issue in question will recur insures that the government, as defender of its policies, is a recurrent litigant who will be aware of the impact that an adverse determination will have on its future activities. Its adverse interest is thus assured. See, e.g., *Carroll* v. *President & Commissioners of Princess Anne County*, 394 U.S. 175 (1968).

Although the mootness doctrine in "recurrence" cases is inconsistently and confusingly applied, there is one policy thread that runs throughout. In cases determined not to be moot, the real concern of the courts has seemed to be the avoidance of the potential for continuous litigation of the same issues when those issues affect large segments of the public. This concern is manifested in the cases as an expression of the "public interest". While cases which have been found not to be moot can be read to share this concern, there are other cases, however, which have been held moot (such as *Oil Workers, supra*) which would appear to have warranted a different result for these same reasons.

This concern for the resolution of issues of public interest resulted in a finding of "justiciability" in the first "recurrence" case, *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897). *Trans-Missouri*, the conceptual progenitor of *Grant, supra*, involved an anti-trust action in which the government sought dissolution and injunction. During the pendency of the appeal, the defendant voluntarily dissolved. The Court held the case not to be moot saying:

> "There mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the legality of the agreement itself for the carrying out of which the association is formed . . . ." *Id.*, at 308.

The defendants were enjoined from re-combining in the future. This is significant because the theory prevalent at the time was that mootness was a remedial concept, and where this Court could not render an effective decree, the matter was moot.[17] In *Trans-Missouri* there was nothing to enjoin since the defendants had ceased their allegedly unlawful combination, and the Court's

[17] See *Singer Mfg. Co.* v. *Wright*, 141 U.S. 696 (1891); *Ex Parte Baez*, 177 U.S. 378 (1900).

decree would have no effect. However, the Court was concerned with the possibility that the "defendants would, by a series of successive re-combinations and dissolutions, engage the government in continuous litigation so that the "rights of the public" in obtaining judicial resolution of the underlying issue would be thwarted. *Id.*, 305-6, 309-10.

Similarly, in *Southern Pacific, supra*, this Court emphasized the importance of judicial review to all carriers who might possibly be affected by the ICC's policy of promulgating short-term orders. And in more recent cases, this concern is more manifest. In *Sibron, supra* the Court expressly stated that it was concerned with ". . . the vital importance of keeping open the avenues of judicial review . . .", 392 U.S. at 52, and in *Moore, supra*, where the underlying issue required resolution because it reflected a ". . . continuing controversy in the federal-state area . . .", 394 U.S. at 681.

In fashioning a rule which may predictably be applied in cases raising a question of mootness, the policy determinations expressed in *Southern Pacific, Sibron*, and *Moore* should be superimposed upon this Court's requirement, as expressed in *Flast* v. *Cohen, supra*, that justiciability is intended to insure that

> ". . . the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the . . . challenge will be made in a form traditionally thought capable of judicial resolution." (at p. 106)

In short, it is posited here that the proper application of the mootness doctrine demands an examination of the following criteria in cases where the immediate parties to the proceeding have adjusted their dispute prior to judicial consideration of the case or specific relief is for any other reason then inappropriate:

1) Whether the issue is one of importance affecting broad segments of the public or a substantial class represented by the plaintiff;

2) Whether the issue is one which may recur; "mere possibility" of recurrance should be the only relevant measure of continuing probability of effect; and

3) Whether there exist some parties to the proceeding who are prepared to litigate the opposing merits of the issues in conformance with the *Flast* standards.

If these criteria are satisfied,—that is, the issue is worth deciding on its merits, may recur to jeopardize others' interests and will be earnestly litigated,—then courts should proceed to an adjudication of that issue. Restricted to these variables, the analysis of mootness cases will be freed from the current excess of tests and categories and will afford a measure of predictability without loss of courts' flexibility within the confines of these proposed criteria to make such judgments as appear appropriate in the case at hand. A particularly meritorious consequence of the adoption of the proposed rule will be to eliminate special tests for special subclasses of cases. There is no inherent necessity for treating labor relations cases differently than any others for purposes of determining mootness. The court below so held not because it was required by logic or policy to do so, but solely because it was thought that this Court's decision in *Oil Workers* compelled that result. Whether *Oil Workers* should be so interpreted warrants this Court's attention. Indeed, this is true irrespective of the advisability of refashioning or clarifying mootness rules generally. For the questions presented in labor relations cases are of no less major consequence than those presented in any other field, no less infrequently present Constitutional problems and balancing requirements between statutory and Constitutional rights, recur no more

infrequently than major issues in other areas, are no less prone to associational representation of members' interests and are no less earnestly pursued and litigated in the courts. On the contrary, arguments may well be advanced to demonstrate that in the often highly-charged atmosphere of labor relations the degree of parties' concern and need for the settlement of potentially difficult future questions is more intense than may be typical elsewhere.[18] But the establishment of that *a fortiori* position is unnecessary to the contention urged here that simpler, more generally applicable and more easily enforceable rules are needed to convert mootness to a manageable and more useful doctrine both in labor relations and elsewhere.

> "If the Court is confronted with a substantial likelihood that an issue it believes moot will always arrive there in the same condition because of the inherent nature of the issue, the Court should not refuse review on the basis of mootness. This policy overrides the first policy of ensuring the effective functioning of the adversary system, so demonstration of the litigants' personal stake should not be required. The Court must acknowledge that the real choice is not between taking or not taking risks with the quality of the judicial process, but between securing or not securing the values of appellate review—stability, uniformity, and objectivity." [19]

---

[18] The underlying substantive issue presented below has given rise to substantial recent litigation demonstrating its significance as an issue, its recurring quality and the willingness of those who are and who may be affected by such recurrence to litigate the matter. See, *e.g.*, *ITT* v. *Minter*, 435 F. 2d 989 (CA 1, 1970); *Grinnell* v. *Hackett*, *supra*; *Almacs* v. *Hackett*, 311 F. Supp. 964 (D.R.I., 1970); *Francis* v. *Davidson*, 340 F. Supp. 351 (D. Mich.), *aff'd. per curiam*, 409 U.S. 904 (1972); *Russo* v. *Kirby*, 453 F. 2d 548, (CA 7, 1971); *Dow Chemical Co.* v. *Taylor*, —— F. Supp. ——, 57 F.R.D. 105 (1972).

[19] Note, 83 Harv. L. Rev. 1672 at 1692 (1970).

III. There Exists An Irreconcilable Conflict Among the Circuits as Well as Between the Circuits and This Court's Decisions.

As has been previously noted herein, the court below, while conceding great doubt and inviting this Court's guidance, held the instant case moot because the union's strike had been discontinued prior to judicial consideration of the strike-related issue which gave rise to the suit. This result was said to be required by the fact that in labor relations cases the absence of a viable dispute rendered a case moot irrespective of the existence of other variables or criteria which would lead courts to hold otherwise in fields other than labor law.

At the outset, that view of the function of mootness in labor relations cases, though premised on the assumed holding of this Court in *Oil Workers*, is in conflict with a substantial number of cases also decided by this Court in the same labor field and in which a decision on the merits had been rendered although the challenged conduct had ceased long before. Among such decisions are *Bakery Sales Drivers Union* v. *Wagshal*, 333 U.S. 437, 442; *N.L.R.B.* v. *Mexia Mills, Inc.*, 339 U.S. 563, 567; *N.L.R.B.* v. *Raytheon Co.*, 398 U.S. 25; and *Local 1976, United Brotherhood of Carpenters and Joiners, et al.* v. *N.L.R.B.*, 357 U.S. 93. In the last cited case, for example, a union which had been charged with engaging in unlawful picketing had agreed to cease such conduct after the filing of those charges but prior to the issuance of any formal administrative Complaint. The union had, moreover, as part of its cessation of unlawful conduct, fully settled the case with the complaining employer and had executed a collective bargaining agreement containing an explicit pledge not to resume striking. To the contention that the case was moot this Court disagreed

and held ". . . the controversy was not rendered moot . . . we cannot say that there was no danger of continued violation."

Similarly, the Courts of Appeals have regularly adjudicated labor issues over objection that the parties' settlement of their dispute or the cessation for other reasons of the alleged improper conduct rendered the cases moot. Illustrative cases include *N.L.R.B.* v. *United Hatters, et al.*, 286 F. 2d 950 (CA 4, 1961):

> "Nor can we adopt the suggested dismissal of the petition as now presenting only an academic question inasmuch as the pickets have long since been withdrawn.";

N.L.R.B. v. *Local 182, IBT*, 314 F. 2d 53 (CA 2, 1963); *N.L.R.B.* v. *Plumbers Union of Nassau County, Local 457, et al.*, 299 F. 2d 497 (CA 2, 1962); *N.L.R.B.* v. *Globe Wernicke Systems Co.*, 336 F. 2d 589 (CA 6, 1964):

> "Abandonment of an unfair labor practice does not cause the controversy to become moot.";

N.L.R.B. v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109 (CA 7, 1963):

> "If the court makes no decision as to the Respondent's former conduct, it may then be repeated; hence a decision as to its legality will not be a futile exercise of jurisdiction."

The Third Circuit itself, in contrast to its decision herein, declined to hold a case moot on application for an injunction by the National Labor Relations Board despite prior full compliance with all aspects of the Board's remedial order. *N.L.R.B.* v. *Local 65, Carpenters Union*, 318 F. 2d 419 (CA 3, 1963). The latter case was one in which the *government* was the moving party. Lest it be assumed that this factor militates against the con-

clusion that the Third Circuit itself has rendered inconsistent decisions in this area, this Court's attention is directed to another Third Circuit opinion which was issued *subsequent* to the instant case and which involved two opposing *private* parties. In *Pittsburgh Newspaper Printing Pressmen's Union No. 9* v. *Pittsburgh Press Co. et al.*, —— F. 2d ——, 83 LRRM 2349 (decided May 29, 1973), that court held that the appellant-unions' appeal from the district court's denial of an injunction to restrain the employer's reduction of number of work shifts pending arbitration was *not* moot despite the fact that the parties' dispute had since been resolved through arbitration. The court held that ". . . this appeal is not moot because the issues involved are 'capable of repetition yet evading review' ". In its decision, the court failed to mention, much less distinguish, the instant case decided shortly before.

In order to highlight the conflict which afflicts this area, this Court is referred to still another Third Circuit decision in which the court held moot a *private* party's appeal of a district court's alleged improper limitation of its participatory rights under Section 10 (l) of the National Labor Relations Act. *Samoff* v. *IAM, Lodge No. 1*, 420 F. 2d 952 (CA 3, 1969). The court's decision holding the appeal to be moot was premised on the settlement of the dispute which gave rise to the proceedings in which the appellant wished to exercise a participatory role. *Samoff* would thus appear to be consistent with the decision below but inconsistent with a dissimilar panel's subsequent holding in *Pittsburgh Press.*

However, shortly after *Samoff* was decided the identical factual and legal situation arose in the Eighth Circuit. *Terminal Freight Cooperative Assn. et al.* v. *Solien*, 440 F. 2d 124 (CA 8, 1971). The Eighth Circuit reached a contrary result:

> "In [*Samoff*], the Third Circuit held the execution of a collective bargaining agreement mooted an appeal on a similar issue. We are not disposed to follow this holding as we think it is contrary to the teaching of the Supreme Court in *United States* v. *W. T. Grant Co.* . . ."

In further explication of its holding,—in a case brought by *private* parties protesting an alleged breach of rights guaranteed under the labor laws—the Eighth Circuit expressly relied on mootness doctrine which had arisen in non-labor areas in suits brought by the government:

> "We do not think this case is moot because the probability of repetition of unlawful secondary boycott activity by the Union in the instant case is sufficient to satisfy the "mere probability" test articulated in *United States* v. *W. T. Grant Co.* . . . . In our view, a case is justiciable 'if there is a probability that the challenging party will be affected should recurrence take place' . . .. We believe that the doctrine of mootness should not be used to perpetually frustrate review of issues of public importance arising in otherwise justiciable cases . . ." (Quoting Comment, 83 Harv. L. Rev. 1672, 1692)

In summary, there can be no serious argument with the proposition that the law regarding mootness, both in labor law cases as well as in other fields of law, is in serious disorder. There is authority supporting altogether inconsistent results and a demonstrable and irreconcilable conflict among the circuits themselves. The need to promote order and predictability is patent. This Court has achieved that end recently in another important area which had previously been in similar disaray,—the law of standing. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150; *Barlow* v. *Collins*, 397 U.S. 159. A comparable effort,—sought even by the court below,—is warranted.

CONCLUSION

For the reasons stated above, in supplementation of those stated by the petitioner, it is urged that the petition for writ of certiorari herein be granted.

Respectfully submitted,

MILTON A. SMITH
General Counsel

OTTO F. WENZLER
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H Street, N.W.
Washington, D.C. 20006

GERARD C. SMETANA
925 South Homan Avenue
Chicago, Illinois 60607

JERRY KRONENBERG
BOROVSKY, EHRLICH & KRONENBERG
120 South La Salle Street
Chicago, Illinois 60603

Of Counsel:

COLE, ZYLSTRA & RAYWID
2011 Eye Street, N.W.
Washington, D.C.

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
FILED
NOV 26 1973
MICHAEL RODAK, JR., CLERK

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; and A. ROBERT SCHAEVITZ

Petitioners

vs.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION NO. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Respondents

BRIEF FOR PETITIONERS

HERBERT G. KEENE, JR.
JAMES A. YOUNG
1300 Two Girard Plaza
Philadelphia, Pa. 19102

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
111 West Washington Street
Chicago, Illinois 60602
Attorneys for Petitioners

Of Counsel:
STRADLEY, RONON, STEVENS & YOUNG
1300 Two Girard Plaza
Philadelphia, Pa. 19102

LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statutes Involved	3
Statement of the Case	4
Summary of Argument	7
Argument	9
I. The "Current Contours" of the Mootness Doctrine Permit Resolution of the Instant Controversy	9
A. The Evolution of the Mootness Doctrine	9
B. The Present Case Involves Both the Requisite Probability of Recurrence of the Dispute and Adverse Effect on Petitioners	11
C. The Instant Case Falls Within the Ambit of the Southern Pacific Doctrine	15
D. Oil Workers Is Inapposite	17
II. The New Jersey Policy of Providing Subsidies to Striking Employees Is an Impermissible Obstacle to the Accomplishment of Federal Labor Policy	19
A. Free Collective Bargaining Without Government Interference Is Essential to the Federal Labor Scheme	21
B. A State Interest Cannot Legitimize an Intrusion Upon Federal Law	23
C. Assuming Arguendo That the New Jersey Policy Is Not Prohibited as a Matter of Law, a Demonstration That Substantial Subsidies Are Available to Striking Employees Constitutes a Prima Facie Showing of an Impermissible Obstruction of Free Collective Bargaining	24
Conclusion	27

AUTHORITIES CITED

Cases

Abbott Laboratories v. Gardner, 387 U. S. 136 (1967) 15

Ablondi v. Board of Review, 8 N. J. Super 71 (App. Div. 1950) 22

A. F. L. v. Watson, 327 U. S. 582 (1946) 14

Aeronautical Lodge 727 v. Campbell, 337 U. S. 521 (1949) 14

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227 (1937) .9, 10

Almac's, Inc. v. Hackett, 312 F. Supp. 964 (R. I. 1970) 14, 19

American Shipbuilding Co. v. N. L. R. B., 380 U. S. 300 (1965) 21

Atherton Mills v. Johnston, 259 U. S. 13 (1922) 12

Atlantic Richfield Co. v. Oil Chemical & A. Wk'rs., Int'l. Union, 447 F. 2d 945 (7th Cir. 1971) 12, 13

Avco Corp. v. Local 787, UAW, 459 F. 2d 968 (3rd Cir. 1972) 12, 13

Boys Market, Inc. v. Retail Clerks Union, Local 770, 398 U. S. 235 (1970) 14

Brockington v. Rhodes, 396 U. S. 41 (1969) 18

Cab Operating Corp. v. City of New York, 243 F. Supp. 550 (S. D. N. Y. 1965) 23

Carroll v. Commissioners of Princess Anne County, 393 U. S. 175 (1968) 16

Colorado Anti-Discrimination Commission v. Continental Airlines, 372 U. S. 714 (1963) 24

Commercial Cable Co. v. Burleson, 250 U. S. 360 (1969) 18

Committee to Free the Fort Dix 38 v. Collins, 429 F. 2d 807 (3rd Cir. 1970) 10

Cooper v. Pate, 378 U. S. 546 (1964) 5

Dandridge v. Williams, 397 U. S. 471 (1970) 19

Delaware Coach v. Public Service Commission, 265 F. Supp. 648 (Del. 1967) 23, 24, 25

Division 1287, Bus Employees v. Missouri, 374 U. S. 74 (1963) 14

Doremus v. Board of Ed., 342 U. S. 429 (1951) 12

Dow Chemical Company, The v. Taylor, ____ F. Supp. ____, 57 F. R. D. 105 (E. D. Mich., *pend.*) 19

Ex Parte Baez, 177 U. S. 378 (1900) 9

Fishgold v. Sullivan Dry Dock & Repair Corp., 328 U. S. 276 (1946) 14

Flast v. Cohen, 392 U. S. 83 (1968) 12

Florida Lime & Avocado Growers v. Paul, 373 U. S. 132 (1963) 24

Francis v. Davidson, 340 F. Supp. 351 (Md. 1972), *aff'd per curiam*, 404 U. S. 904 (1972)..... 19

Free v. Bland, 369 U. S. 663 (1962) 24

Gardner v. Toilet Goods Assoc., 387 U. S. 167 (1967) . 15

Garner v. Teamsters Union, 346 U. S. 485 (1953) 25

Gatling v. Butler, 52 F. R. D. 389 (D. Conn. 1971) 11

General Dynamics Corp. v. Local 5, Shipbuilders, 469 F. 2d 848 (1st Cir. 1972) 13

General Electric Company v. Callahan, 294 F. 2d 60 (1st Cir. 1960) 22, 26

Goldberg v. Kelly, 397 U. S. 254 (1970) 16

Grand Rapids City Coach Lines v. Howlett, 137 F. Supp. 667 (W. D. Mich., 1955) 22, 23, 26

Gray v. Sanders, 372 U. S. 368 (1963)..... 11

Great N. Ry. v. Sunburst Oil & Refining Co., 287 U. S. 358 (1932) 10

Grinnell Corporation v. Hackett, 475 F. 2d 449 (1st Cir. 1973), *cert. den.* 94 S. Ct. 164 (Oct. 9, 1973)..... .....9, 13, 15, 17, 19, 25

Hall v. Beals, 396 U. S. 45 (1969) 11

I. T. T. Lamp Division v. Minter, 435 F. 2d 989 (1st Cir., 1970), *cert. den.* 402 U. S. 933 (1971), *reh. den.* 404 U. S. 874 (1971).....4, 5, 16, 19, 20, 23, 25

John Hancock Mutual Life Insurance Co. v. Commissioner of Insurance, 349 Mass. 390, 208 N. E. 2d 516 (1965) 22, 23, 25

Kuhn v. Fairmont Coal Co., 215 U. S. 344 (1910) 10

Lascaris v. Wyman, ... N. Y. ..... (1973), *cert. den.* 94 S. Ct. 165 (Oct. 9, 1973)..... 19

Liner v. Jafco, 375 U. S. 301 (1964) 17

Linkletter v. Walker, 381 U. S. 668 (1965) 10

Local 1976, Carpenters v. N. L. R. B., 357 U. S. 93 (1958) 13

Local 24, International Brotherhood of Teamsters v. Oliver, 358 U. S. 283 (1959) 21

Matson Terminals, Inc. v. California Employment Commission, 24 Cal. 2d 695 (1944) 22

McDonnell-Douglas Corp. v. Green, ... U. S. ....., 36 L. Ed. 2d 668 (1973) 25

A. C. Mechling Barge Line v. U. S., 368 U. S. 324 (1961) 18

Moore v. Ogilvie, 394 U. S. 814 (1969) 11, 15, 16, 18

Motor Coach Employees v. Lockridge, 403 U. S. 274 (1971) 20

Motor Coach Employees v. Missouri, 374 U. S. 74 (1963) 24

Nash v. Florida Industrial Commission, 389 U. S. 235 (1967) 25

N. L. R. B. v. Exchange Parts Co., 375 U. S. 405 (1964) 26

N. L. R. B. v. Globe Wernicke Systems Company, 336 F. 2d 589 (6th Cir. 1964) 13

N. L. R. B. v. Granite State Joint Bd., 409 U. S. 213 (1972) 26

N. L. R. B. v. Insurance Agents' Int'l. Union, 361 U. S. 477 (1960) 14, 21

N. L. R. B. v. Local 825, Operating Engineers, 400 U. S. 297 (1970) 13

N. L. R. B. v. Marsh Supermarkets, Inc., 327 F. 2d 109 (7th Cir. 1963) 12, 13

N. L. R. B. v. Mexia Textile Mills, 339 U. S. 567 (1958) 13

N. L. R. B. v. Newark Morning Ledger, 120 F. 2d 262 (3rd Cir. 1941), *cert. den.* 314 U. S. 692 (1941)..... 14

N. L. R. B. v. Plumbers Union of Nassau County, Local 457, 299 F. 2d 497 (2nd Cir. 1962) 13

N. L. R. B. v. Raytheon Company, 398 U. S. 25 (1970) 13

N. L. R. B. v. Savair Mfg. Co., 470 F. 2d 305 (6th Cir. 1972), *cert. granted* 36 L. Ed. 2d 683 (1973)..... 26

N. L. R. B. v. United Hatters, 286 F. 2d 950 (4th Cir. 1961) 13

New York Telephone Company, et al. v. New York State Dept. of Labor, No. 73 Civ. 4557 (S. D. N. Y., *pend.*) 19

North Carolina v. Rice, 404 U. S. 244 (1971) 10

Oil, Chemical & Atomic Workers v. Arkansas Louisiana Gas Co., 332 F. 2d 64 (10th Cir., 1964) 22, 26

Oil Workers v. Missouri, 361 U. S. 363 (1960) 5, 9, 14, 17, 18

Pacific Maritime Association v. Int'l. Longshoremen's Union, 454 F. 2d 262 (9th Cir. 1971) 13, 16
Perez v. Campbell, 402 U. S. 637 (1971) 5, 23, 24
H. K. Porter Co. v. N. L. R. B., 397 U. S. 99 (1970).... 21
Powell v. McCormack, 395 U. S. 486 (1969)..... 18
Printing Pressmen's Union No. 9 v. Pittsburgh Press Company, 479 F. 2d 607 (1973) 13, 16
Roe v. Wade, ... U. S. ....., 35 L. Ed. 2d 147 (1973) 7, 13, 15, 16
Russo v. Kirby, 453 F. 2d 548 (2nd Cir. 1971) 19
San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959) 20, 24, 25
Sears, Roebuck and Co. v. Stiffel Co., 376 U. S. 225 (1964) 24
Sibron v. New York, 392 U. S. 40 (1968) 16
Sierra Club v. Morton, 405 U. S. 727 (1972) 12
Solien v. Miscell. Drivers & Helpers Union, Local No. 610, 440 F. 2d 124 (8th Cir. 1971) 10, 16
Southern Pacific Terminal Co. v. I. C. C., 219 U. S. 498 (1911) 5, 7, 9, 10, 16
Teamsters, Local 20 v. Morton, 377 U. S. 252 (1964).21, 25
Toilet Goods Assoc. v. Gardner, 387 U. S. 158 (1967)..14, 15
United States v. Concentrated Phosphate Export Ass'n., 393 U. S. 199 (1968) 11
United States v. Trans-Missouri Freight Association, Inc., 166 U. S. 290 (1897) 10
United States v. W. T. Grant Co., 345 U. S. 629 (1953) 12
Weber v. Anheuser-Busch, Inc., 348 U. S. 468 (1955) 24
Westinghouse Electric Corporation v. Board of Review, 25 N. J. 221 (1957) 22

Statutes and Regulations

38 Federal Regulations No. 1 (Jan. 3, 1973) 19

2 U. S. Code Congressional and Administrative News, 90th Cong. 1st Sess. (1967) 26

Miscellaneous

Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337 (1972) 20, 21

Daily Labor Report, No. 77 (April 2-20, 1973)..... 19

Davis, Ripeness of Governmental Action for Judicial Review, 68 Harv. L. Rev. 1122 (1955) 15

Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002 (1924) 10

Iowa Brief *Amicus Curiae* in *ITT Lamp Division* v. *Minter* 19

Massachusetts Brief in Opposition in *I. T. T. Lamp Division* v. *Minter*, supra..... 20

Note, Cases Moot on Appeal: A Limit on the Judicial Power, 103 U. Penn. L. Rev. 772 (1955) 10

Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672 n. 22 .....10, 16

Thieblot and Cowin, Welfare and Strikes: The Use of Public Funds to Support Strikers, Industrial Research Unit, University of Pennsylvania Press (1972) 23

U. S. Department of Labor Statistics, Bureau of Labor Statistics, Work Stoppages in 1971 (Selected Final Tabulations) (June 1972) 12, 14

Wyoming Brief *Amicus Curiae* in *ITT Lamp Division* v. *Minter* 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ

Petitioners

vs.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION NO. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Respondents

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (App., pp. A47-A72) is reported at 469 F. 2d 911. The United States District Court for the District of New Jersey filed no formal written opinion; its oral opinion is set forth at App., pp. 45-46.

JURISDICTION

The judgment of the Court of Appeals (App., pp. 73-74) was entered on November 22, 1972. A timely petition for rehearing was denied on December 20, 1972. App., p. 108. The petition for writ of certiorari was filed on May 19, 1973, and was granted on October 9, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Is the issue of the constitutionality of state welfare assistance to strikers rendered moot by the termination of Petitioners' particular strike, notwithstanding (a) the continuing effect of such assistance upon the Petitioners' future contract negotiations and on-going daily collective bargaining relationships; (b) the continuing availability of such assistance and the likelihood of a recurrent impact on other employers; and (c) the fact that, if considered moot, a significant question of national importance would become inherently evasive of appellate review?

2. Does the state grant of welfare assistance to strikers constitute an impermissible obstacle to the accomplishment and execution of national labor policy?

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, Clause 1 and Article VI, Clause 2 of the United States Constitution are set forth at App., p. 109.

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (29 U. S. C. § 141 *et seq.*), New Jersey's General Public Assistance Law (NJSA 44:8-107 *et seq.*), the applicable Department of Health, Education and Welfare and New Jersey Regulations on Payment of Welfare Assistance to Strikers, New Jersey's former Assistance for Dependent Children Law (NJSA 44:10-1 *et seq.*), the Social Security Act of 1935, as amended (42 U. S. C. § 602 *et seq.*), New Jersey's present Assistance to Families of the Working Poor Law (NJSA 44:13-1 *et seq.*) and those portions of New Jersey's Unemployment Compensation Act (NJSA 43:21-1 *et seq.*) excluding individuals participating in a labor dispute from eligibility for such benefits are all set forth at App., pp. 109-140.

STATEMENT OF THE CASE

On May 14, 1971, employees of the Petitioners represented by Respondent Teamsters Local Union 676, in support of their demands for modification of an expired collective bargaining agreement, commenced a strike which was to last for a full six weeks until the employees returned to work on June 28, 1971. After ascertaining that many of the strikers were receiving welfare assistance from the State of New Jersey,[1] the instant suit was filed on June 10, 1971 seeking both declaratory and injunctive relief. The complaint alleged that the availability of such a state subsidization of strikers, by allying the state's economic power on the side of the Union, frustrated the national labor policy of free collective bargaining and thereby contravened the Supremacy Clause of the Constitution.

On June 24, 1971, the District Court, without an evidentiary hearing and notwithstanding the Petitioners' expressed desire to offer testimony in support of their complaint,[2] dismissed the

1. Such payments were being made under New Jersey General Public Assistance, NJSA 44:8-107 *et seq.*, a state program, and Aid for Dependent Children (AFDC), NJSA 44:10-1 *et seq.*, a joint state-federal program. App., pp. 126-132. Effective June 30, 1971, New Jersey elected to no longer to participate in the unemployed parent segment of the AFDC program and enacted, in lieu thereof, its Assistance to Families of the Working Poor program, NJSA 44:13-1 *et seq.*, which also provides benefits to striking employees. App., pp. 132-136.

2. Counsel for the Petitioners, for example, informed the District Court that he was prepared to offer testimony through Dr. Herbert R. Northrup, Director, Industrial Research Unit, Wharton School of Finance and Commerce, University of Pennsylvania, with respect to the various factors concerning the payment of welfare benefits to strikers which were considered critical in *I. T. T. Lamp Division* v. *Minter*, 435 F. 2d 989 (1st Cir., 1970), *cert. den.*, 402 U. S. 933 (1971), *reh. den.*, 404 U. S. 874 (1971). The Court was further advised that Petitioners were prepared to offer testimony through several state welfare officials as to the number of Petitioners' em-

action under F. R. C. P. Rule 12(b)(6) for failure to state a claim upon which relief may be granted. App., pp. 45-46.[3] An appeal was thereafter taken to the Court of Appeals for the Third Circuit which, on November 22, 1972, in a divided decision, dismissed the appeal as moot with directions to the District Court, on remand, to vacate its order and dismiss for the same reason. App., pp. 73-74. The panel majority, although observing that because " . . . of the time required to perfect appeals both to this Court and to the Supreme Court, review may be unavailable in the majority of cases such as this" (App., p. 59), nevertheless concluded that, while this Court's recent pronouncements on mootness in other contexts "perhaps indicat[e] some lessening of the mootness stricture, [they] do not appear to affect the vitality of *Oil Workers* [v. *Missouri*, 361 U. S. 363 (1960),] in a labor contract. If *Oil Workers* is to be found not harmonious with the current contours of the mootness doctrine, that decision should, and perhaps must, be made by the U. S. Supreme Court." App., p. 65. The majority further concluded that the present case was neither encompassed within the doctrine of *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498 (1911), nor had an "on-going direct effect on appellants". App., p. 60. Judge Gibbons, dissenting, argued that

ployees then on strike who had applied for and were receiving public welfare benefits from the State of New Jersey and the approximate ranges of the monthly benefits being paid. The Court, however, declined to accept such testimony and dismissed the complaint in its entirety on the basis of *I. T. T. Lamp Division*. Petitioners, in a further attempt to place the testimony of Dr. Northrup and their other witnesses before the Court of Appeals, moved the District Court, on July 27, 1971, pursuant to F. R. C. P. Rule 27(b), for leave to take the depositions of said persons. This motion was denied by the District Court on August 24, 1971. App., p. 2. An affidavit of Dr. Northrup who later received and filed with the record in the Court of Appeals. App., pp. 75-108.

3. Since the present appeal arose from a motion to dismiss, and Petitioners sought to adduce evidence below, it is fundamental that all the factual allegations contained in the complaint (App., p. 12) and the motion for a preliminary injunction (App., p. 26) must be presumed to be true. See *Cooper* v. *Pate*, 378 U. S. 546 (1964), and *Perez* v. *Campbell*, 402 U. S. 637, 657 (1971) (separate opinion of Justice Blackmun).

"[t]he issues in this case are of considerable public interest, and likely to recur. Overanxiety on the part of the federal courts to find such cases non-justiciable is not consistent with our judicial obligations." App., p. 71. A petition for rehearing was denied by the Court on December 20, 1972. App., p. 108.

SUMMARY OF ARGUMENT

1. The "current contours" of the mootness doctrine permit resolution of the instant controversy. Respondent State of New Jersey has evidenced no indication that it will change its policy of making welfare assistance available to strikers. Nor is there any indication that there will be a diminution of the significant effect of that assistance on both Petitioners' subsequent negotiations for new union contracts and their on-going daily collective bargaining relationships. There is present in this case, therefore, both the probability of recurrence of the allegedly objectionable action and likelihood of impact on the same objecting litigants required to satisfy the present criteria of mootness. This case is demonstrably one that will be contested with the necessary adverseness and vigor, and with sufficient impact of actuality, to warrant judicial resolution.

The issue of whether state welfare assistance to strikers unconstitutionally insulates one party—the striking union—from the economic disadvantages of a strike is, moreover, a recurrent and important controversy in the federal-state area. It is, furthermore, a question which, because of the relative brevity of strikes compared with the prolonged period necessary to appeal a case to this Court, is truly capable of repetition yet likely to be evasive of review. Such a case, as this Court recognized in *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498, 515 (1911), and *Roe* v. *Wade*, ... U. S. ....., 35 L. Ed. 2d 147, 161 (1973), presents a "classic justification for a conclusion of non-mootness." On this ground also, the decision below should be reversed.

2. This Court should resolve the merits of this controversy. Assistance to the lower federal courts is necessary to resolve the widespread litigation of similar questions and afford guidance

to dispel the current uncertainties over state welfare to striker policies. Free collective bargaining is the cornerstone of federal labor policy. This Court has been careful, therefore, to protect that cornerstone against state intrusion. Any application of state law which upsets the balance of power between labor and management expressed in the national labor policy—regardless of the alleged state interest involved—has been prohibited. The grant of state welfare assistance to strikers constitutes precisely such an impermissible state rebalancing of economic power. The state has created a potent weapon which necessarily restricts the desired bilateral freedom of collective bargaining left free by Congress for the operation of economic forces. State welfare assistance to strikers, accordingly, should be declared to be an unconstitutional impediment to federal labor policy.

ARGUMENT

I

THE "CURRENT CONTOURS" OF THE MOOTNESS DOCTRINE PERMIT RESOLUTION OF THE INSTANT CONTROVERSY

The court below, in direct conflict with *Grinnell Corporation* v. *Hackett*, 475 F. 2d 449, 454 (1st Cir., 1973), *cert. den.* 94 S. Ct. 164 (Oct. 9, 1973), held that *Oil Workers* mandates that the present case be deemed moot. This conclusion is based, as shown below, on a misunderstanding of the "current contours" of the mootness doctrine; a failure to recognize the continuing impact of New Jersey's welfare to strikers subsidy on both Petitioners' subsequent contract negotiations and their on-going daily collective bargaining relationships; a misapplication of the "capable of repetition, yet evading review" doctrine of *Southern Pacific;* and a resultant erroneous application of *Oil Workers.*

A. The Evolution of the Mootness Doctrine

Historically, without reference to constitutionally imposed jurisdictional limitations, the federal courts declined, as a matter of discretion, to entertain matters where there "was nothing that the judgment of the Court . . . could have affected" (*Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. at 515 (dictum)) or if "there is no subject-matter on which the judgment of the court can operate." *Ex Parte Baez*, 177 U. S. 378, 390 (1900). These concepts, which sufficed prior to acceptance of the declaratory judgment as a form of relief, were reevaluated after recognition of declaratory judgments as Article III controversies in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 241 (1937). Jurisdictional issues never before reached were thereafter discussed in terms of the available rubrics in-

cluding mootness.[4] The doctrine of mootness thus evolved into a jurisdictional barrier defined by the controversy requirement of Article III.[5] The probability of recurrence, which had previously operated to qualify the common law mootness doctrine,[6] was subsequently utilized to discern the existence of an Article III controversy. The mootness doctrine in short, converged with Article III limitations; the jurisdictional test henceforth was determined by either "two probabilities—[1] recurrence of the objectionable action and [2] impact on the same objecting litigants" or the "capable of repetition, yet evading review" standard of *Southern Pacific. Committee to Free the Fort Dix 38* v. *Collins,* 429 F. 2d 807, 812 (3rd Cir. 1970); see also *Solien* v. *Miscell. Drivers & Helpers Union Local No. 610,* 440 F. 2d 124, 127 (8th Cir. 1971). These tests insured that each case would be presented in an adversary context and with sufficient "impact of actuality"[7] to preclude the risk of issuing of a speculative or merely advisory opinion.

---

4. See Note, *Mootness on Appeal In The Supreme Court,* 83 Harv. L. Rev. 1672, 1676, n. 22 ("retrospective effect, long indispensable to judicial decisions, is no longer required") Compare *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 344, 372 (1910) (Holmes J., dissenting), with *Great N. Ry.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358, 364 (1932), and *Linkletter* v. *Walker,* 381 U. S. 618, 622-29 (1965).

5. The first implication that mootness was a jurisdictional barrier is found in *Aetna,* 300 U. S. at 240. See Note, *Mootness on Appeal in the Supreme Court,* 83 Harv. L. Rev. at 1676. See also *North Carolina* v. *Rice,* 404 U. S. 244, 246 (1971): "our impotence to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy."

6. See, e.g., *Southern Pacific Terminal Co.* v. *I. C. C.,* 219 U. S. at 515; and *United States* v. *Trans-Missouri Freight Association, Inc.,* 166 U. S. 290 (1897).

7. See Frankfurter, *A Note on Advisory Opinions,* 37 Harv. L. Rev. 1002, 1006 (1924). See also Note, *Cases Moot On Appeal: A Limit On The Judicial Power,* 103 U. Penn. L. Rev. 772, 774 (1955).

B. The Present Case Involves Both the Requisite Probability of Recurrence of the Dispute and Adverse Effect on Petitioners

1. The present case fully satisfies the dual objectives of the mootness doctrine. The probability of recurrence of the objectionable conduct is surely sufficient. At issue here is the "deeply rooted and long-standing" (*Gray* v. *Sanders*, 372 U. S. 368, 376 (1963)) policy of the State of New Jersey to subsidize striking employees thereby upsetting the federal labor scheme of free collective bargaining. The State has evidenced "no indication of change" (*Hall* v. *Beals*, 396 U. S. 45, 49 (1969)) in this policy and has continued to automatically disburse the disputed subsidies to future strikers.[8] Manifestly, this deliberate and persistent official policy leaves little uncertainty that the State's conduct raises "a continuing controversy in the federal-state area" (*Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969)) which precludes the conclusion that "the allegedly wrongful behavior could not reasonably be expected to recur." *United States* v. *Concentrated Phosphate Export Ass'n.*, 393 U. S. 199, 203 (1968). The termination of the Petitioners' particular labor dispute, accordingly, does not remove the cause of the present action. It is the recurrent availability and payment of welfare benefits to strikers, rather than any of the peculiarities incident to Petitioners' 1971 strike, which is at the crux of this dispute. That issue remains unresolved and certain of recurrence; the challenged state practice has been left "in effect to govern future [labor disputes]." *Gatling* v. *Butler*, 52 F. R. D. 389, 394 (D. Conn. 1971), citing *Gray* v. *Sanders*, 372 U. S. at 375-6. The Respondent Union, accordingly, did

8. As the dissent below correctly observed, "[i]t is clear from the briefs filed on behalf of the public defendants that welfare benefits are still available . . . and that the state has no present intentions of changing its policy . . ." App., p. 67. Indeed, in its argument below, as well as in its memorandum in opposition to the petition for certiorari, the State did not contend the instant matter was moot but, rather, addressed only the merits.

not meet its "heavy burden," as the party urging mootness, of showing that "there is no reasonable expectation that the wrong will be repeated." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953).[9]

2. Petitioners' continuing nexus with the objectionable conduct is also sufficient to insure that ". . . the issues will be contested with the necessary adverseness and that the litigation will be pursued with necessary vigor . . . " *Flast* v. *Cohen*, 392 U. S. 83, 106 (1968); and see *Sierra Club* v. *Morton*, 405 U. S. 727 (1972). At the outset it is beyond cavil that, even if the instant dispute is narrowly viewed as one confined to the *payment* of welfare benefits to strikers, this is still not a controversy whose resolution could have no possible effect on the Petitioners. Cf. *Atherton Mills* v. *Johnston*, 259 U. S. 13 (1922), and *Doremus* v. *Board of Ed.*, 342 U. S. 429 (1951). The frequency of labor disputes,[10] the established collective bargaining bargaining relationship to which Petitioners are a party (see n. 12, *infra*), and the fact that the Respondent Union has called strikes in the past, demonstrate that the probability of Petitioners involvement in a future strike is substantial. Labor disputes, after all, are more likely than other actions "to be repeated" and preclude "a decision as to . . . legality . . . [from becoming] a futile exercise of jurisdiction." *N. L. R. B.* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109, 111 (7th Cir. 1963). Courts, as a result, have frequently adjudicated labor contro-

9. *Atlantic Richfield Co.* v. *Oil Chemical & A. Wk'rs., Int'l., Union*, 447 F. 2d 945, 947 (7th Cir. 1971) ("If past wrongs have been proved [which is all that Petitioners seek to do], and the possibility of future misconduct survives so does the court's power"); and *Avco Corp.* v. *Local, UAW 787*, 459 F. 2d 968, 974 (3rd Cir. 1972). ("If misconduct occurred in the past, and the possibility of its recurrence survives, a case is not moot.")

10. In a typical year, New Jersey will experience 281 work stoppages affecting 114,000 workers who will, under that State's welfare policies, be eligible for benefits. U. S. Department of Labor, Bureau of Labor Statistics, *Work Stoppages in 1971 (Selected Final Tabulations)* June, 1972, p. 42.

versies even after the settlement of the underlying dispute.[11] In fact, since strikes, like pregnancy "often comes more than once" (*Roe* v. *Wade*, ... U. S. ....., 35 L. Ed. 2d at 161 (1973)), there should be no room for doubt that the Petitioners continue to be affected employers. As the First Circuit stated in an identical situation, " . . . nothing in the record suggests the unlikelihood of future repetition." *Grinnell Corporation* v. *Hackett*, 475 F. 2d at 454.

In addition, the Petitioners are separately affected by the continuing *availability* of state welfare assistance to strikers. Such availability necessarily alters Petitioners' continuing collective bargaining relationships.[12] Collective bargaining does not merely involve a once-every-three-years negotiation; it is also a day-to-day process which seeks practical analysis and implementation of the provisions, ambiguities and omissions of a collective bargaining agreement. Collective bargaining, in other words, is a "continuing and developing process . . . [and]

11. See, e.g., *N. L. R. B.* v. *Raytheon Company*, 398 U. S. 25 (1970); *N. L. R. B.* v. *Local 825, Operating Engineers*, 400 U. S. 297 (1970); *N. L. R. B.* v. *Mexia Textile Mills*, 339 U. S. 567 (1958); and *Local 1976, Carpenters* v. *N. L. R. B.*, 357 U. S. 93 (1958). See also *N. L. R. B.* v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109 (7th Cir. 1963); *N. L. R. B.* v. *United Hatters*, 286 F. 2d 950 (4th Cir. 1961); *N. L. R. B.* v. *Plumbers Union of Nassau County, Local 457*, 299 F. 2d 497 (2nd Cir. 1962); *N. L. R. B.* v. *Globe Wernicke Systems Company*, 336 F. 2d 589 (6th Cir. 1964); *Pacific Maritime Assn.* v. *Longshoremen*, 454 F. 2d 262 (9th Cir. 1971); *Atlantic Richfield Co.* v. *Oil, Chemical & Atomic Workers Int'l. Union, AFL-CIO*, 447 F. 2d 945 (7th Cir. 1971); *General Dynamics Corp.* v. *Local 5, Shipbuilders*, 469 F. 2d 848 (1st Cir. 1972); and *Avco Corp.* v. *Local 787, UAW*, 459 F. 2d 968 (3rd Cir. 1972). The Third Circuit itself recently reaffirmed this principle. *Printing Pressmen's Union No. 9* v. *Pittsburgh Press Company*, 479 F. 2d 607 (1973).

12. In his dissent below, Judge Gibbons raised various questions as to the actual collective bargaining relationship now in existence where the record, in his opinion, was insufficient. App., pp. 65-72. In order to meet, at least in part, this objection, an affidavit of Harold Finkle, Esq., has been included in the appendix to which is attached the 1971-1974 contract between Petitioners and Respondent Union. App., pp. 141-193. The contract contains a binding grievance-arbitration procedure (App., pp. 163-164) but does not contain a no-strike provision.

not a detached and isolated procedure which, once reflected in a written agreement, becomes a final and permanent result". *N. L. R. B.* v. *Newark Morning Ledger*, 120 F. 2d 262, 267 (3rd Cir. 1941), *cert. den.* 314 U. S. 693 (1941). See also *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, 328 U. S. 276 (1946); and *Aeronautical Lodge 727* v. *Campbell*, 337 U. S. 521 (1949). The motive power for agreement in this on-going relationship is the same as that which governs contract negotiations: "the availability of economic pressure devices to each [party] to make the other party incline to agree on one's terms" *N. L. R. B.* v. *Insurance Agents' Int'l. Union*, 361 U. S. 477, 489 (1960). Clearly, therefore, as one court concluded in identical circumstances, "knowledge" of the availability of state strike assistance must "influence" a union's position and judgment, not only while such payments are being made but also in anticipation thereof. *Almac's, Inc.* v. *Hackett*, 312 F. Supp. 964, 968 (R. I. 1970).[13] This irremediable "loss in bargaining position" (see *A. F. L.* v. *Watson*, 327 U. S. 582 (1946)) necessarily has an impact which "could be said to be felt immediately by those [employers, like Petitioners] subject to it in conducting their day-to-day affairs." *Toilet Goods Assoc.* v. *Gardner*, 387 U. S. 158, 164 (1967). It is an impact which, in view of the certainty of recurrence of the objectionable action here, should, in and of itself, preclude a finding of mootness. See, e.g., *Division 1287, Bus Employees* v. *Missouri*, 374 U. S. 74 (1963), the sequel to *Oil Workers*, which, as the dissent below observed, ". . . is quite closely in point, for it recognizes

13. Notwithstanding deterrents (see *Boys Market, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235 (1970)), strikes continue to occur with frequency during the term of collective bargaining agreements. The latest figures of the U. S. Department of Labor, Bureau of Labor Statistics, for example, indicate that during 1971, 1,699 work stoppages, or 33.1% of the total number of stoppages, involving over 654,000 workers, were stoppages that occurred during the term of agreements but not in connection with negotiations of new contracts. The workdays lost by such stoppages were a lesser percentage (5.6%) of the workdays lost by all stoppages. U. S. Department of Labor, Bureau of Labor Statistics, *Work Stoppages in 1971 (Selected Final Tabulations)*, June 1972, p. 5.

that the availability of state interference can have an ongoing effect upon the collective bargaining relationship, and that a controversy over such availability is not moot, as long as the affected relationship exists." App., p. 71.[14]

C. The Instant Case Falls Within the Ambit of the Southern Pacific Doctrine

The substantive issue in this case raises a significant and "continuing controversy in the federal-state area" (*Moore* v. *Ogilvie*, 394 U. S. 814 (1969)). See the discussion at pp. 19-21, *infra*.[15] It is also a question which, in light of the relative brevity of labor disputes compared with the prolonged period necessary to appeal a case to this Court, presents what has been described as a "classic justification for a conclusion of nonmootness. It truly could be capable of repetition, yet evading review." *Roe* v. *Wade*, ... U. S. ....., 35 L. Ed. 2d 147,

14. Alternatively, wholly apart from the impact of recurrent strikes, the "self-executing effect" of the availability of the disputed subsidies, coupled with the irreparable nature of the resultant harm, would render the instant action ripe *prior* to the outbreak of any strike. See Davis, *Ripeness of Government Action For Judicial Review*, 68 Harv. L. Rev. 1122, 1138 (1955); and see also *Toilet Goods Assoc.* v. *Gardner*, *supra*; *Gardner* v. *Toilet Goods Assoc.*, 387 U. S. 167, 171 (1967); and *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 152 (1967). Indeed, the choice facing an employer, i.e., whether to accede to a union's demands or endure a strike in which the union is assisted by a public subsidy, creates the "dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Abbott Laboratories* v. *Gardner*, 387 U. S. at 152.

15. The wide impact of the substantive issue was recognized by the Court of Appeals: ". . . it is important to note the intervention of the Teamsters Union and the participation, *amicus curiae*, of the Chamber of Commerce of the United States. The presence of these parties does suggest an on-going interest in the issue raised in this litigation." App., p. 59. In fact, the Chamber repeatedly sought to intervene in these proceedings, *inter alia*, to avoid the necessity of considering mootness but was granted only *amicus* status. App., p. 75. Cf. *Grinnell Corporation* v. *Hackett*, 475 F. 2d at 454: "Moreover, the intervening Chambers of Commerce, who have filed their own complaint for declaratory and injunctive relief, represent many other employers in Rhode Island, as to at least some of whom the issue is certain to recur."

161 (1973), quoting *Southern Pacific*. See also *Carroll* v. *Commissioners of Princess Anne County*, 393 U. S. 175 (1968), and *Moore* v. *Ogilvie, supra*. It is of "vital importance" that the brief duration of wrongful conduct not be used to foreclose permanently the "avenues of judicial review" to an entire affected class. *Sibron* v. *New York*, 392 U. S. 40, 51-53 (1968). These principles are applicable, as courts of appeals have recognized on other occasions,[16] to labor controversies. They are also applicable to dispute involving the grant or termination of public assistance. See *Goldberg* v. *Kelly*, 397 U. S. 254 (1970); Note, *Mootness On Appeal In The Supreme Court*, 83 Harv. L. Rev. at 1691, n. 87. Indeed, in *I. T. T. Lamp Division*, the case considered dispositive on the merits by the District Court, the First Circuit invoked the same considerations, noting that the

16. See, e.g., *Printing Pressmen's Union* v. *Pittsburgh Press Company*, 479 F. 2d at 609, n. 1 ("Although the underlying disputes between employer and unions have been resolved, and although the unions obtained from this court previously what they were unable to obtain from the district court originally, this appeal is not moot because the issues involved are 'capable of repetition yet evading review.' "); and *Pacific Maritime Association* v. *International Longshoremen's Union*, 454 F. 2d 262, 263-4 (9th Cir. 1971), where the court observed:

> Generally speaking, a case is moot when the issues presented are no longer 'live,' or parties lack a legally cognizable interest in the outcome. *Powell* v. *McCormack*, 395 U. S. 486, 496, 89 S. Ct. 1944, 23, L. Ed. 2d 491 (1969). But an issue remains 'live' unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. *United States* v. *Concentrated Phosphate Export Ass'n., Inc.*, 393 U. S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968). As the District of Columbia Circuit said in *Friend* v. *United States*, 128 U. S. App. D. C. 323, 388 F. 2d 579, 581 (1967): '. . . cases are not made moot by the expiration of orders of brief duration capable of future repetition.'

See also *Solien* v. *Miscell. Drivers and Helpers Union, Local 610*, 440 F. 2d at 127-8: ". . . we believe that the doctrine of mootness should not be used to perpetually frustrate judicial review of issues of public importance arising in otherwise justiciable cases . . . the policy of ensuring judicial review of issues of public importance which are inherently evasive of review compels us not to refuse review on the basis of mootness."

present substantive issue "has vainly sought appellate review in this circuit and is likely again to be raised, bringing it close to the 'recurring question' category where *significant public rights* are involved and court review ought not, if possible, be avoided." 435 F. 2d at 991 (emphasis added). See also *Grinnell Corporation* v. *Hackett,* 445 F. 2d at 454 (". . . a case such as this is not moot, although the particular strike which prompted the suit and the payment of benefits challenged have, as here, terminated by the time of appeal."). A similiar conclusion is warranted in this case. This Court should be particularly "astute to avoid hindrances in the way of taking up" questions involving "the danger of state interference with national [labor] policy . . . It would encourage such interference . . . if a . . . holding of mootness based on the chance event of completion [of a strike] . . . barred this Court's review of . . . [an] adverse decision on the claim of federal preemption." *Liner* v. *Jafco,* 375 U. S. 301, 307 (1964).

D. Oil Workers Is Inapposite

In *Oil Workers,* the Governor of Missouri, pursuant to authority granted by state statute, seized the equipment and facilities of a struck plant and sought an injunction ordering the striking employees to return to work. In opposing the injunction, the striking union unsuccessfully challenged the constitutionality of the underlying statute. On appeal, noting that the injunction had "expired by its own terms," this Court held that there was no controversy before it upon which a decision could be rendered. 361 U. S. at 371.

Oil Workers considered the union's argument only as it contested the validity of the injunction. This Court did not consider the effect of the allegedly unconstitutional statute upon the ongoing collective bargaining process. Indeed, it is questionable whether this broader perspective could have been considered because the constitutionality of the Missouri statute was

raised by the union only by way of answer to the Governor's prayer for injunction. In the instant case, however, by means of a complaint for declaratory judgment, Petitioners have directly placed in issue the constitutionality of the New Jersey welfare-to-strikers policy. This distinction in the methods by which a question is presented is critical. Cf. *Moore* v. *Ogilvie, supra,* with *Brockington* v. *Rhodes,* 396 U. S. 41 (1969).[17] See also *Powell* v. *McCormack,* 395 U. S. 486, 495-498 (1969).

Oil Workers, moreover, also involved merely a speculative possibility of the challenged conduct's recurrence—the objectionable statute had not been invoked for three years and could only be invoked at the discretion of the governor—which precluded entry of a meaningful order. 361 U. S. at 366, 367, 371. As in other similar situations,[18] the absence of a significant probability that the objectionable conduct would recur—rather than the continued standing of a litigant to challenge that conduct—resulted in a finding of mootness. Here, to repeat, the allegedly wrongful policies of the State of New Jersey continue unabated and certain of recurrence.

---

17. In *Moore,* this Court rejected a mootness contention in a suit for an injunction and declaratory judgment because the election in which the requirements for a nominating petition were challenged had passed prior to appeal, whereas in *Brockington* a similar mandamus action was held moot. This Court specifically observed that the reason for mootness in *Brockington* was the limited nature of the relief sought and noted that the petitioner there had not sought a declaratory judgment although that avenue was open to him. 396 U. S. at 43. The plaintiff in *Brockington,* in short, had limited his claim to a particular election whereas the *Moore* plaintiff, while asking for an injunction applicable to a specific election, had also indicated a broader adversity as to the ongoing validity of the challenged statute.

18. See, e.g., *A. C. Mechling Barge Line* v. *U. S.,* 368 U. S. 324 (1961) (change in the challenged policies of the I. C. C.); and *Commercial Cable Co.* v. *Burleson,* 250 U. S. 360 (1969) (insufficient possibility that a seizure because of war would recur after the war was concluded).

II

THE NEW JERSEY POLICY OF PROVIDING SUBSIDIES TO STRIKING EMPLOYEES IS AN IMPERMISSIBLE OBSTACLE TO THE ACCOMPLISHMENT OF FEDERAL LABOR POLICY

The issue of state subsidies to striking employees is, as already noted, a recurrent subject of substantial litigation,[19] national controversy[20] and importance.[21] In *ITT Lamp Division*, an almost unprecedented eleven states joined to urge this Court to review this question. The active participation by such a substantial number of states vividly underscores the widespread significance of this issue. The states want this matter resolved. They want to terminate the serious dislocation that presently prevails in the administration of the federal welfare program. They desire a gauge by which to measure the range of permissive state action in the area of labor relations. These

19. See *ITT Lamp Division* v. *Minter, supra; Grinnell Corporation* v. *Hackett, supra; Francis* v. *Davidson,* 340 F. Supp. 351 (Md. 1972), *aff'd per curiam,* 404 U. S. 904 (1972); *Almac's* v. *Hackett, supra; Russo* v. *Kirby,* 453 F. 2d 548 (2nd Cir. 1971); *The Dow Chemical Company* v. *Taylor,* .... F. Supp. ...., 57 F. R. D. 105 (E. D. Mich. *pend.*); *Lascaris* v. *Wyman,* .... N. Y. .... (1973), *cert. den.* 94 S. Ct. 165 (Oct. 9, 1973); and *New York Telephone Company, et al.* v. *New York State Dept. of Labor,* No. 73 Civ. 4557 (S. D. N. Y., *pend.*).

20. Following the Court's summary affirmance in *Francis* v. *Davidson, supra,* for example, the Department of Health, Education and Welfare announced that it would entertain comments from interested parties on a clarification of its regulations as to whether strikers were entitled to AFDC payments. 38 Fed. Reg. No. 1 (Jan. 3, 1973). More than 10,000 responses were received. 77 Daily Labor Report A-7 (April 20, 1973). See also, for the resultant change in the regulations, App., pp. 121-125.

21. The issue is one of importance to every employer and employee whose industrial relations are governed by a collective bargaining agreement (see n. 15, *supra*), as well as to those who must exercise the ". . . difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge* v. *Williams,* 397 U. S. 471, 487 (1970). See n. 26, *infra.*

goals cannot by achieved unless this Court provides the requisite guidance.[22]

The major labor preemption problem that previously concerned this Court was to articulate a rule from which the lower courts could determine the limits of their jurisdiction when dealing with labor related matters. See *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), and *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971). The instant case raises a different Supremacy Clause question of a similar, if not greater, magnitude:[23] the permissible extent of state power,

22. Compare, e.g., the position of Iowa in its *amicus* brief in *ITT Lamp Division* in support of the petition for rehearing (p. 3) ("the State of Iowa believes that allowing welfare assistance to persons on strike contravenes the Federal statutory scheme manifesting the general policy of free collective bargaining") with that of Massachusetts in its brief in opposition (p. 5) (". . . the court of appeals [here] reached the only possible conclusion—substantial doubt that a significant frustration of federal collective bargaining policy was effected by the granting of welfare benefits to indigent strikers . . ."). The states, in short, do not now know whether their requisite neutrality in a labor dispute demands the withholding of welfare assistance from strikers (*amicus* brief of Wyoming in support of the *ITT Lamp Division* pet. for reh., p. 4) or whether, conversely, they may provide such benefits since "the asserted conflict involve[s] only a 'tangential frustration' of unfettered collective bargaining." Mass. br. in opp., p. 5.

23. This case does not fall within the rules established by this Court in *Garmon*. See *ITT Lamp Division* v. *Minter*, 435 F. 2d at 992. *Garmon* and its progeny, in contrast to the instant case, dealt principally with the problem of primary jurisdiction, i.e., the jurisdiction of the states over matters "arguably subject" to the jurisdiction of the National Labor Relations Board. It must be noted, however, that even *Garmon* has been the subject of severe criticism. See Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337 (1972). Professor Cox has argued that the *Garmon* doctrine should be accommodated with traditional notions of federal pre-emption by restating that rule so as to disallow any state action which alters the economic balance achieved by Congress, whether or not the state action is directed at conduct "arguably" regulated by the Labor Act. "The occasion seems ripe [he concludes] for a review of the development of, and basic issues in, the law pertaining to Federal occupation of the field of labor disputes." *Id.* at p. 1339. While petitioners do not seek to re-evaluate *Garmon*, they do seek to apply traditional notions of federal pre-emption to non-*Garmon* state interference with federal labor policy.

albeit perhaps directed at non-labor objectives, to alter the collective bargaining process. This question also warrants resolution.

A. Free Collective Bargaining Without Government Interference Is Essential to the Federal Labor Scheme

The process chosen by Congress to promote economic stability and minimize industrial strife is unfettered collective bargaining. *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283, 295 (1959). The use of economic sanctions is at the core of this federal scheme. *N. L. R. B.* v. *Insurance Agents Union, supra; H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970). "The degree of economic power the parties possess" (*N. L. R. B.* v. *Insurance Agents Union*, 361 U. S. at 489), rather than the "Government, control[s] the results of the negotiations." *Id.* at 488. The right to bargain collectively thus clearly contemplates economic warfare, and "does not entail any 'right' to insist on one's position free from economic disadvantage." *American Shipbuilding Co.* v. *N. L. R. B.*, 380 U. S. 300, 309 (1965).

Consistent with these principles, the courts have jealously guarded the process of collective bargaining from state interference. This Court, for example, has heretofore found that for a state "[t]o restrict either the objectives for which economic pressure can be applied [see *Local 24, International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283 (1959)], or the forms of pressure which are permissible [see *Teamsters, Local 20* v. *Morton*, 377 U. S. 252 (1964)] tips the scale towards management or union." See Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. at 1353. In *Oliver*, this Court explained (358 U. S. at 296):

> Since the federal law operates here, in an area [collective bargaining] where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State.

See, to the same effect, *John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance*, 349 Mass. 390, 398, 208 N. E. 2d 516 (1965).[24] The controlling principle, in short, is that where state action may have a coercive effect, whether direct or indirect, upon the parties to a labor dispute, it is prohibited by the overriding federal policy.[25] See, e.g., the various cases in which publicity by state boards of conciliation has been held to be an impermissible intrusion upon the federally protected process of free collective bargaining. *General Elec-*

24. After a careful analysis in the *John Hancock* case, the Supreme Court of Massachusetts recognized the full extent to which Congress has occupied this field. Striking down a statute permitting owners of debit life insurance policies an additional grace period in the event of a strike by an insurance company's collecting agents, the court stated:

> For the state to intrude into such an area [collective bargaining] designed to be kept free is as much a violation of Federal policy as it is for a state to attempt to regulate rights or duties specifically protected by the federal acts. 349 Mass. at 398; 208 N. E. 2d at 524-525.

25. This principle of governmental neutrality, although prohibiting subsidies to strikers in this instance, applies equally well to employers. A state could not aid an employer during a labor dispute by subsidy, or by requiring an unemployed individual to take work at a struck plant. The California Supreme Court in *Matson Terminals, Inc.* v. *California Employment Commission*, 24 Cal. 2d 695, 707 (1944), stated the principle well in construing the California unemployment compensation law:

> The Act establishes a policy of neutrality in trade disputes by provisions that the payment or withholding of benefits should not be used to aid either party to a trade dispute. Thus, the provision disqualifying a worker who leaves his work because of a trade dispute § 56(a), is balanced by the provisions that *other unemployed workers* shall not be required to fill the vacated jobs or lose their right to unemployment insurance benefits. (§ 13(b)(1)). The payment of benefits to a claimant who leaves his work because of a trade dispute would conflict with this policy just as would the withholding of payments because a claimant refused to become a strike breaker. (emphasis supplied).

The New Jersey courts and legislature have enunciated a similar principle. See *Ablondi* v. *Board of Review*, 8 N. J. Super. 71, 76 (App. Div. 1950); *Westinghouse Elec. Corp.* v. *Board of Review*, 25 N. J. 221 (1957); and App., pp. 136-140.

tric Company v. *Callahan*, 294 F. 2d 60 (1st Cir., 1960); *Oil Chemical & Atomic Workers* v. *Arkansas Louisiana Gas Co.*, 332 F. 2d 64 (10th Cir., 1964); *Grand Rapids City Coach Lines* v. *Howlett*, 137 F. Supp. 667 (W. D. Mich., 1955). The grant of substantial direct financial assistance to one party to a labor dispute,[26] of course, presents an even clearer instance of improper state action; the state has created a ". . . potent [and prohibited] weapon which cannot fail unilaterally to restrict the desired bilateral freedom of collective bargaining, left free by Congress for the operation of economic forces." *John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance*, 349 Mass. at 398; 208 N. E. 2d at 524. Cf. *Cab Operating Corp.* v. *City of New York*, 243 F. Supp. 550, 552 (S. D. N. Y., 1965); and *Delaware Coach* v. *Public Service Commission*, 265 F. Supp. 648, 654 (Del. 1967).

B. State Interest Cannot Legitimize An Intrusion Upon Federal Law

The District Court's reliance upon *I. T. T. Lamp Division* for the proposition that a state interest may foreclose consideration of a preemption claim can only be described, in words of

26. The magnitude of public assistance to strikers cannot be gainsaid. The only comprehensive compilation of data in this area (Thieblot and Cowin, *Welfare and Strikes: The Use Of Public Funds to Support Strikers*, Industrial Research Unit, University of Pennsylvania Press (1972); see also the admitted affidavit of Dr. Herbert Northrop, App., pp. 75-104), for example, shows, *inter alia*, these significant facts:

(1) Workers may receive 80-90% or more of their working income through public funds while on strike (Thieblot and Cowin, *supra*, at pp. 101, 148, 200);

(2) Payments of $300-$350 per month in public funds are commonplace (*id.* at 100, 142, 199-200);

(3) 50% or more of a work force may receive public funds during a strike (*id.* at 106);

(4) The estimated total public funds to be expended for the benefit of strikers during calendar 1973 is nearly $304 million dollars (*id.* at 193); and

(5) Public welfare assistance has played a major role in at least two major strikes in New Jersey (*id.* at 143-150).

this Court, as an "aberrational doctrine." *Perez* v. *Campbell*, 402 U. S. 637, 651-652 (1971). Heretofore it has been clear that once it has been shown that a state statute may stand "as an obstacle to the full effectiveness of a federal statute . . ." (*The Colorado Anti-Discrimination Commission* v. *Continental Airlines*, 372 U. S. 714, 722 (1963)), or "clashes" directly or indirectly with the "objectives" of federal policy (*Sears, Roebuck and Co.* v. *Stiffel Co.*, 376 U. S. 225, 231 (1964)), such interference by the state is prohibited. Neither the similarity nor difference between the objectives of state and federal law (see *Florida Lime & Avocado Growers* v. *Paul*, 373 U. S. 132, 141-142 (1963); and *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 (1955)) nor the "relative importance to the State of its own law is . . . material." *Free* v. *Bland*, 369 U. S. 663, 666 (1962). These precepts are equally applicable in the field of labor relations. See, e.g., *San Diego Building Trades Council* v. *Garmon*, 359 U. S. at 244, where this Court observed that it does not matter "whether the States have acted through laws of broad application rather than laws specially directed towards governance of industrial relations"; *Motor Coach Employées* v. *Missouri*, 374 U. S. 74, 80-81 (1963), where the use of "emergency legislation", passed "to protect the public from threatened breakdowns in vital community services", was prohibited; and *Delaware Coach* v. *Public Service Commission, supra.* The District Court by holding, in effect, that the state interest here was paramount, disregarded these principles.

C. Assuming Arguendo That the New Jersey Policy Is Not Prohibited As a Matter of Law, a Demonstration That Substantial Subsidies Are Available to Striking Employees Constitutes a Prima Facie Showing of an Impermissible Obstruction of Free Collective Bargaining

Assuming *arguendo* that a factual determination is found necessary to determine whether federal policy is obstructed by the payment and/or availability of state welfare assistance to

strikers, the administration of justice will be best served if this Court clarifies the applicable evidentiary standards that must be satisfied to demonstrate that ". . . a State [has] imping[ed] on the area of labor combat designed to be free. . . ." *Garner* v. *Teamsters Union*, 346 U. S. 485, 500 (1953). At present, while cases across the nation have questioned the type of state policies at issue here, the sole authorities, providing any guidance as to the evidentiary question, are so complex, confusing and prohibitively expensive to implement as to virtually permit federal policy to be frustrated by default. See *Grinnell Corporation* v. *Hackett*, 475 F. 2d at 457-461, and *I. T. T. Lamp Division* v. *Minter*, 435 F. 2d at 993-4. Recently this Court, in another situation, defined the applicable rules that should prevail during a trial on remand. *McDonnell-Douglas Corp.* v. *Green*, ... U. S. ....., 36 L. Ed. 2d 668 (1973). A formulation of the appropriate preemption test to govern the trial of this case is equally necessary.

In prior cases, when this Court has concluded that a state policy improperly tips the scale towards management or union, it has not required any empirical evidence, let alone the "macrocosmic" and "complex" record required by *Minter* and *Grinnell*. In *Morton*, for instance, where this Court invalidated a state law even though the particular conduct it regulated was not arguably proscribed or protected by federal law, i.e., a non-*Garmon* situation, the plaintiff was not required to demonstrate by any "macrocosmic" standard that the objectionable activities interfered with the bargaining process. This Court, indeed, has inferred, *without evidence*, that certain restraints have a "direct tendency to frustrate" federal policy and that financial pressure influences human conduct. See, e.g., *Nash* v. *Florida Industrial Commission*, 389 U. S. 235 (1967). Accord: *John Hancock Mutual Life Insurance Co.* v. *Commissioner of Insurance, supra; Delaware Coach* v. *Public Service Commission, supra.*[27] It is precisely

27. See also the various cases in which publicity by state boards of conciliation have been held to be an impermissible intrusion, again without empirical evidence, upon the federally protected process of

such an inference which, Petitioners submit, should be drawn in the instant matter upon a demonstration, as is already apparent, of significant financial inducements offered by the state to striking employees.

The inference that even moderate financial penalties or benefits will generally alter the course of human conduct permeates our entire legal system. For example, a common feature of the entire criminal law system is the use of financial penalties to deter illegal conduct. The courts and the National Labor Relations Board have similarly recognized that even subtle conduct by either unions or employers might be read as a financial threat or inducement that will alter a worker's vote.[28] Indeed, Congress has incorporated such an inference into the entire welfare scheme.[29] Finally, and perhaps even more significant, is this Court's recognition that financial pressures will deter a man from choosing to cross a picket line and returning to his job—the very issue at bar.[30] Thus, to hold that significant state subsidies to strikers constitute a *prima facie* demonstration of an improper intrusion upon federal labor policy comports

---

free collective bargaining. *General Electric Company* v. *Callahan*, 294 F. 2d 60 (1st Cir., 1960); *Oil Chemical & Atomic Workers* v. *Arkansas Louisiana Gas Co.*, 332 F. 2d 64 (10th Cir. 1964); *Grand Rapids City Coach Lines* v. *Howlett*, 137 F. Supp. 667 (W. D. Mich. 1966).

28. See, e.g., *N. L. R. B.* v. *Savair Mfg. Co.*, 470 F. 2d 305 (6th Cir. 1972), *cert. granted*, 36 L. Ed. 2d. 683 (1973); and *N. L. R. B.* v. *Exchange Parts Co.*, 375 U. S. 405 (1964).

29. In 1967, Congress amended the welfare laws (42 U. S. C. § 602; App., p. 112) to provide an incentive to work. In essence, the first $30 a man earned and 30% of every additional dollar was not deducted from his welfare check. These moderate amounts were described as providing for "the first time . . . the encouragement to take a job" (113 Cong. Rec. S. 32852 (Nov. 16, 1967)—comment of Sen. Ribicoff), and of "paramount importance [in providing] an incentive . . . to seek work." (113 Cong. Rec. 423102 (Aug. 17, 1971)—comments of Rep. Feighan). See 2 U. S. Code Congressional and Administrative News, 90th Cong. 1st Sess. (1967), pp. 2834, 2994.

30. See *N. L. R. B.* v. *Granite State Joint Bd.*, 409 U. S. 213 (1972).

with a basic assumption of our legal system. If federal supremacy is to be meaningful, the burden must be borne by the state to demonstrate that the normal course of human conduct is, for some heretofore inexplicable reason, inoperative in a strike situation.

CONCLUSION

For each of the foregoing reasons, Petitioners respectfully request that this Court (1) reverse the Court of Appeals and (2) reverse the District Court on the merits. Alternatively, Petitioners submit that the administration of justice would be served if this Court provides evidentiary guidelines in this important area of federal-state relations.

Respectfully submitted,

HERBERT G. KEENE, JR.
JAMES A. YOUNG
1300 Two Girard Plaza
Philadelphia, Pa. 19102

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
111 West Washington Street
Chicago, Illinois 60602
Attorneys for Petitioners

Of Counsel:
STRADLEY, RONON, STEVENS
& YOUNG
1300 Two Girard Plaza
Philadelphia, Pa. 19102

LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

Supreme Court, U. S.
FILED
DEC 17 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; AND
A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

MILTON SMITH,
General Counsel,

RICHARD BERMAN,
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H Street, N. W.,
Washington, D. C.,

GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,

JERRY KRONENBERG,
Borovsky, Ehrlich & Kronenberg,
120 South LaSalle Street,
Chicago, Illinois 60603,
Attorneys for the Amicus Curiae.

Of Counsel:
COLE, ZYLSTRA & RAYWID,
2011 Eye Street, N. W.,
Washington, D. C.

TABLE OF CONTENTS

PAGE

Interest of the Amicus Curiae 1

Summary of Argument 2

Argument 4

I. With Respect to the Doctrine of Mootness 4

A. The Nature of the Problem in the Analysis of Mootness 4

B. The Differing Variables Which Have Been and Are Currently Employed by the Courts in Determining Whether a Case Is Moot 7

C. Evaluation of the Variables Courts Have Employed in Mootness Cases and an Alternative Proposal for Analyzing Mootness 14

D. There Exists an Irreconcilable Conflict Among the Circuits as Well as Between the Circuits and This Court's Decision Which Would Be Resolved by the Adoption of the Previously Proposed Ordering and Synthesis of Mootness Criteria 22

II. The Merits of the Underlying Dispute 26

Conclusion 31

TABLE OF AUTHORITIES CITED

Cases

Almacs v. Hackett, 311 F. Supp. 964 (D. R. I., 1970).. 21

Bakery Sales Drivers Union v. Wagshal, 333 U. S. 363 (1960) 8, 23

Boggess v. Berry Corp., 233 F. 2d 389, 391 (CA 9, 1956) 15

Brockington v. Rhodes, 396 U. S. 41 (1969) 11

Campbell Soup Co. v. Martin, 202 F. 2d 298, 399 (CA 5, 1953) 15

Carroll v. President & Commissioners of Princess Anne County, 394 U. S. 175 (1968) 17

Commercial Cable Co. v. Burleson, 250 U. S. 360 (1919) 8

Dow Chemical Co. v. Taylor, ... F. Supp. ....., 57 F. R. D. 105 (1972) 21, 29

Dyer v. SEC, 266 F. 2d 33, 47 (CA 8), *cert. denied*, 361 U. S. 835 (1959) 15

Ex Parte Baez, 177 U. S. 378 (1900) 18

Flast v. Cohen, 392 U. S. 83, 95 (1968) 6, 19

Francis v. Davidson, 340 F. Supp. 351 (D. Md.), *aff'd. per curiam*, 409 U. S. 904 (1972) 21

Friend v. United States, 388 F. 2d 579, 581 (CA DC, 1967) 15

Garner v. Teamsters Union, 346 U. S. 485, 500 (1953) 27, 28

Gray v. Sanders, 372 U. S. 368 (1968) 9, 10, 11

Grinnell v. Hackett, 475 F. 2d 499, 82 LRRM 2986 (1973) 16, 20, 21, 29, 30

Hall v. Beals, 396 U. S. 45 (1969) 11

ITT v. Minter, 435 F. 2d 989 (CA 1, 1970) 21

Lascaris v. Wyman, ... N. Y. ..... (1973), *cert. den.* 94 S. Ct. 165 (Oct. 9, 1973) 21

Local 1976, United Brotherhood of Carpenters and Joiners, et al. v. N. L. R. B., 357 U. S. 93 23

A. L. Mechling Barge Lines v. United States, 368 U. S. 324 (1961) 8

Moore v. Ogilvie, 394 U. S. 814 (1969) 10, 11, 13, 14, 15, 18, 19

N. L. R. B. v. Globe Wernicke Systems Co., 336 F. 2d 589 (CA 6, 1964) 23

N. L. R. B. v. Insurance Agents Union, 361 U. S. 477, 489 (1960) 26, 28

N. L. R. B. v. Local 65, Carpenters Union, 318 F. 2d 419 (CA 3, 1963) 24

N. L. R. B. v. Local 182, IBT, 314 F. 2d 53 (CA 2, 1963) 23

N. L. R. B. v. Marsh Supermarkets, Inc., 327 F. 2d 109 (CA 7, 1963) 23

N. L. R. B. v. Mexia Mills, Inc., 339 U. S. 563, 567 (1950) 8, 23

N. L. R. B. v. Plumbers Union of Nassau County, Local 457, et al., 299 F. 2d 497 (CA 2, 1962) 23

N. L. R. B. v. Raytheon Co., 398 U. S. 25 (1970) 8, 23

N. L. R. B. v. United Hatters, et al., 286 F. 2d 950 (CA 4, 1961) 23

New York Telephone Co., et al. v. N. Y. Dept. of Labor, No. 73 Civ. 4557 (S. D. N. Y., pending) 21

Oil Workers, Local 806 v. Missouri, 361 U. S. 363 (1960) 8, 9, 10, 11, 13, 14, 17, 22

Pittsburgh Newspaper Printing Pressmen's Union No. 9 v. Pittsburgh Press Co., et al., ... F. 2d ....., 83 LRRM 2349 (decided May 29, 1973) 24

H. K. Porter v. N. L. R. B., 397 U. S. 99, 108 (1970) ... 26, 28

Russo v. Kirby, 453 F. 2d 548 (CA 2, 1971) 21, 29

Samoff v. IAM, Lodge No. 1, 420 F. 2d 952 (CA 3, 1969) 24

Sibron v. New York, 392 U. S. 40 (1968) 12, 13, 14, 15, 18, 19

Sierra Club v. Morton, 405 U. S. 727 (1972) 20

Singer Mfg. Co. v. Wright, 141 U. S. 696 (1891) 18

Southern Pacific Terminal Co. v. ICC, 219 U. S. 498 (1911) 12, 13, 15, 18, 19

Street Employees Div. 998 v. Wisconsin Employment Relations Board, 340 U. S. 416, 418 (1951) 15

Street Employees Div. 1287 v. Missouri, 374 U. S. 74 (1963) 8

Terminal Freight Cooperative Assn. et al. v. Solien, 440 F. 2d 124 (CA 8, 1971) 25

United States v. Trans-Missouri Freight Association, 166 U. S. 290 (1897) 18

United States v. W. T. Grant Co., 345 U. S. 629, 632 (1953) 7, 8, 9, 10, 11, 13, 15, 17, 18

Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 594 (1952) 6

Statutes

National Labor Relations Act, Section 1 26

U. S. Const., Art. III, Sec. 2 5

Miscellaneous

Comment, 83 Harv. L. Rev. 1672 (1970) 22, 25

Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033 (1968) 16

"Moot" Administrative Orders, 53 Harv. L. Rev. 628, 630 (1940) 15

Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. Pa. L. Rev. 772 (1955) 5

Note, *Moot Cases on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672 (1970) 5, 9, 13

Note, 130 U. Pa. L. Rev. 772 ..... 5, 10

Sidney A. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125 (1946) 5, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; AND
A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF THE CHAMBER OF COMMERCE AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The interest of the Chamber of Commerce is set forth in the previously filed "Motion of the Chamber of Commerce of the United States for Leave to Intervene" in this case. Although this Court denied the Motion, the Chamber was permitted to participate as *amicus curiae* herein. Pursuant to Rule 42 of this Court, consents from all parties to this case have been obtained for the Chamber's participation as *amicus curiae.*

SUMMARY OF ARGUMENT.

This case presents the Court with two questions of major importance to great numbers of affected employers, employees and unions is areas where the parties and lower courts are without effective guidance.

The first of these questions relates to the appropriate criteria for determining when cases are (rather, are not) moot in the labor law field. The court below, faced with the substantive question as to the propriety of States' payment of welfare benefits to strikers, held this case moot because the strike had terminated during the course of litigation. In its analysis, the lower court adopted the view that in labor cases, apparently distinguished from cases arising in other areas of the law, the lack of need for relief in the case renders it inappropriate for judicial attention notwithstanding the facts that the question is of general public importance affecting many persons, is of a recurring nature, would otherwise repeatedly tend to evade resolution and would be earnestly litigated by genuinely adverse parties. Yet these very criteria, or some of them, have led other courts to conclude that cases are not moot in the labor law area as well as in others. Analysis of mootness decisions reveals, generally, that courts have sought to develop separate tests for separate kinds of cases, producing no clear direction, and rendering variables determinative in some cases which are deemed irrelevant in others. It is here submitted that a single test should govern the determination of mootness in all cases, and that test should consist precisely of the described factors which the court below declined to apply in labor cases.

The second question presented here is the substantive matter which gave rise to the mootness dispute,—the propriety of States' subsidies to strikers during the course of their strike. The *amicus* contends that in the National Labor Relations Act

a federal policy was created fostering free collective bargaining as the means by which parties should resolve their labor disputes. Free collective bargaining requires that the parties be left to their own resources of strength, initiative and resolve. Intervention by the State on either side of the parties' dispute constitutes a violation of the necessity for governmental neutrality which is basic to the federal scheme. States' payment of welfare benefits to strikers in order to assist them during their strike represents such an intervention on one side of the dispute in violation of the federal scheme and, hence, of the Supremacy Clause of the federal Constitution.

ARGUMENT

I.

WITH RESPECT TO THE DOCTRINE OF MOOTNESS.

The instant case presents an issue of enormous importance for the efficient functioning of the judicial system. The question whether, or under what circumstances, a case has become moot, —a question which can arise to plague any party in any case at any time with respect to any issue,—has produced a wide range of differing views, differing tests and differing results. Predictably, there has resulted an irreconcilable conflict among the circuits. Indeed, both the conflict and the confusion are so clear, that the divided court below expressly invited this Court's attention to the problem.

An appropriate consideration of this question depends, in turn, upon an awareness of the legal and policy conflicts to be resolved. In aid of this Court's deliberations, the Chamber sets forth its view of the antecedents of the problem and a proposed resolution.

A. The Nature of the Problem in the Analysis of Mootness.

The narrow question presented here is whether a case arising under the labor laws becomes moot and should not therefore further engage the judicial process when the immediate dispute which gave rise to it, although of a recurring nature involving matter of public importance, becomes resolved during the process of review.

In the analysis of this question, the generally cited bases for the mootness doctrine itself afford only limited assistance. In its broadest sense, mootness is one of the doctrines by which a court determines whether or not a matter before it may be properly adjudicated. It is a limitation on judicial power. Justiciability, an ill-defined concept relied upon to determine the

scope and limitations of the judicial power, is often thought of as a Constitutional stricture imposed by the "case" or "controversy" requirement.[1] However, the terms "case" or "controversy" are themselves vague and inherently capable of varying interpretation,[2] so that to say that a matter is not "justiciable" because it does not present a "case" or "controversy" is devoid of useful meaning. It is perhaps for this reason that mootness problems, which arise because the conduct complained of has ceased prior to appeal but is likely to recur, have posed a conceptual difficulty that has failed to evoke a consistent or predictable response.[3]

Aside from imprecise Constitutional limits, the *policy* bases for the mootness doctrine similarly offer limited assistance. Those bases have been described as a need to economize judicial endeavor and need to assure the fullest litigation of the issues,—an objective presumably best guaranteed by an existing "controversy."[4] In fact, both criteria are suspect. If an issue is of a recurring nature whose potential effect reaches many prospective plaintiffs or defendants, the greatest judicial economy will result from a decision which will put the issues to rest and obviate much future litigation. If the nature of the recurring issue involved is one which is inherently likely to be resolved prior to a reviewing court's decision on the merits, then a failure to decide it despite such a resolution will only result in proliferating litigation in which each case in turn is likely to become "moot" while the underlying dispute continues to avoid judicial scrutiny. Such a result produces the antithesis of "judicial economy." Similarly, issues of importance whose continuing future effects may be anticipated may well be more earnestly litigated by those, such as associations of potentially affected members, who

1. U. S. Const., Art. III, Sec. 2.

2. *Note*, Cases Moot on Appeal: *A Limit on the Judicial Power*, 103 U. Pa. L. Rev. 772 (1955); *Note, Moot Cases on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672 (1970).

3. See Sidney A. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125 (1946).

4. Note, 103 U. Pa. L. Rev. 772.

foresee an impact on them of those future effects than by directly involved parties who may never see the problem again. That is, there is no inherently necessary connection between the existence of an unresolved dispute and a thorough and competent litigation of the issues.

How, then, should the determination be made as to whether a given case should engage the judicial process? Former Chief Justice Warren, in *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968), stated that justiciability is a concept designed to "limit the business of federal courts to questions presented in an adversary context and in a form capable of resolution through the judicial process."[5] This functional view of justiciability suggests that the conceptual problems involving application of the mootness limitation to the type of case here under consideration may best be resolved and consistency be achieved by analyzing justiciability in terms of the needs and objectives of the appellate judicial process rather than, as has been the case, in terms of the identity of those who seek to litigate the issues or whether a specific instance of a general and continuing controversy has been resolved by the parties.

Fundamentally, that appellate judicial process requires only that degree of adverseness of interest between litigants as will assure both the effective functioning of the adversary system and the effective resolution of issues of public importance. How-

5. Justice Frankfurter, concurring *Youngstown Sheet & Tube Co.* v. *Swayer*, 343 U. S. 579, 594 (1952) expressed a similar view in language which empasized the amorphous quality of the concept:

> "Judicial power can be exercised only as to matters that were the traditional concern of the courts at Westminster, and only if they arise in ways that to the expert feel of lawyers constitute 'cases' or 'controversies.' Even as to questions that were the staple of judicial business, it is not for the courts to pass upon them unless they are indispensably involved in conventional litigation. . . ."

What is the relationship between what may once have been "traditional" to what is now, in a vastly changed time, appropriate? How does one codify the "expert feel" of lawyers? And to the extent that the legal system adjusts to the needs of an ever more complex society, can the notion of "conventional litigation" remain constant?

ever, in making mootness determinations, courts have evolved a variety of theories which are in no way consonant with each other. We submit, with reference to the requirements set forth above, that clarity and uniformity in the application of the mootness doctrine can be accomplished without compromising the objectives and needs of sound judicial policy and specifically without subjecting courts to an undesirable or unavoidable flood of litigation.

B. The Differing Variables Which Have Been and Are Currently Employed by the Courts in Determining Whether a Case Is Moot.

In determining whether a case which involves an important and recurring question becomes "moot" when the immediate parties have adjusted their personal dispute prior to definitive judicial consideration of the issue presented, or when relief to the contending parties is otherwise inappropriate, courts have applied tests which are often artificial and have achieved inconsistent results.

In *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953), one of the most often cited decisions in this area, the defendants in an anti-trust suit voluntarily ceased the conduct complained of prior to final judicial review. The "mere possibility" that the challenged conduct might again recur was held to be sufficient to insure the presentation and vigorous litigation of issues necessary to proper adjudication and prevent the case from being "moot". This Court stated:

> "[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. . . . A controversy may remain to be settled in such circumstances, . . . e.g., a dispute over the legality of the challenged practices. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." (Citations and footnote omitted.)

This proposition had been stated previous to, as well as subsequent to, *Grant*.[6] But it has not, however, been uniformly applied nor does its expressed rationale explain other decided cases.

Grant involved a *governmental* challenge to private conduct that had ceased prior to review, as did the authorities referred to in footnote 6, *supra*. The "mere possibility" of recurrence which precluded a finding of mootness there has not uniformly been applied to otherwise similar situations where it is *private* parties who challenge governmental conduct. Illustrative is *Oil Workers, Local 8-6* v. *Missouri*, 361 U. S. 363 (1960) the case upon which the lower court relied in finding the instant matter moot. In *Oil Workers*, a case brought by private parties, the State of Missouri seized certain struck facilities during emergency circumstances and enjoined any future strike. The Court there held that a repetition of that conduct was merely "speculative," and consequently held the case moot. But is there a difference between the "mere possibility" of recurrence and a "speculative" recurrence? It does seem clear that so long as one may speculate about recurrence,—i.e. it is not impossible, —then there is at least a "mere possibility" that the questioned conduct will be repeated. Curiously, in a subsequent case the same conduct involved in *Oil Workers* was repeated pursuant to the same alleged statutory authority,[7] illustrating that even when

6. *Bakery Sales Drivers Union* v. *Wagshal*, 333 U. S. 437, 422 (1948); *NLRB* v. *Mexia Mills, Inc.*, 339 U. S. 563, 567 (1950); *NLRB* v. *Raytheon Co.*, 398 U. S. 25 (1970).

7. *Street Employees Div. 1287* v. *Missouri*, 374 U. S. 74 (1963); Se, also, an earlier case, *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360 (1919), which involved a seizure by the Postmaster General of the cable company's property during World War I. The possibility that a seizure might recur was held insufficient to afford the necessary personal stake. See, also, *A. L. Mechling Barge Lines* v. *United States*, 368 U. S. 324 (1961) where an ICC order was attacked because it was made without a supporting hearing or findings. The Commission promised that it would make findings in the future, but insisted it was not required to hold hearings. The case was held moot because the new practice of giving findings *"may* lead the Commission to provide for a hearing—at least under some circumstances." *Id.*, at 331. These cases, brought by *private parties* to protest government conduct, represent an avoidance or rejection of the "mere possibility" test.

a future similar injury to claimed interests is only "speculative" it remains "possible." In any event, it would appear that the same degree of likelihood of recurrence which prevents a finding of mootness in suits brought by the government *(Grant)* has resulted in findings of mootness in suits brought against the government by private parties *(Oil Workers).*

The conceptual basis for this disparate treatment may result from an unstated assumption that a private party has an insufficient stake in a recurrence of conduct involved in his suit, conduct to which he might never again be subjected, to warrant reliance upon him to constitute an effective and interested litigant for the future. In cases such as *Grant,* on the other hand, where the government challenges private conduct in its law-enforcement function, the government's future adverse interest may presumably be relied upon; that is, it will continue to enforce the same statute or rule in the same manner against future violators. According to this analysis, in suits brought by private parties the avoidance of mootness requires a greater likelihood of recurrence than "mere possibility". At least one student of this Court's opinions has so concluded.[8]

Unfortunately, this analysis explains only a portion of the relevant cases. Thus, in *Gray* v. *Sanders,* 372 U. S. 368 (1968), this Court expressly applied the "mere possibility" test articulated in *Grant* to a *private* challenge of governmental conduct. *Sanders* was a voter class action challenging a Georgia state statute governing primary elections. The election officials did not follow the statutory plan for the primary in question, and the election was held. In holding the case not moot, this court applied the *Grant* test. The meaning of that case is not entirely clear, however; while the Court's language followed *Grant,* the certainty that the Georgia voters would be adversely affected by any return to the challenged plan would presumably also satisfy the impliedly more stringent *Oil Workers* criteria.

8. This explanation for the described disparate treatment appears to be adopted in *Note,* 83 Harv. L. Rev. 1672 (1970).

Adding to the difficulty of assessing the import of *Sanders* is the contention, according to the court below and at least one legal scholar,[9] that the explanation for the *Sanders* cases lies, instead, in the fact that election cases constitute a separate subgroup for mootness purposes. Under that view the relevant variables to be examined in mootness cases has swelled: Is the Government involved? Who is the plaintiff? What is the degree of likelihood of recurrence of the challenged conduct (differing in effect depending upon who the plaintiff is)? And what kind of case is involved?

As the variables employed by courts have proliferated, it can be seen that the area has taken on a needless and burdensome complexity. Moreover, this Court has never expressly held election cases to represent a separate class and an analysis of such cases yields no evidence of such an intent. *Moore* v. *Ogilvie*, 394 U. S. 814 (1969) involved a *private party's* challenge to the validity of a statute whose provisions were interpreted by state authorities effectively to deprive the challenging party of an opportunity to run for elective office. By the time the case reached this Court the election had already taken place. Nonetheless the case was held not moot. This Court could not realistically say that the challenged conduct would with certainty affect the challenging party in the future. On the contrary, one could only "speculate" whether he would again run for elective office. Rather, the case was deemed non-moot because it involved an important public question which would affect *other* similar private parties in the future since the same governmental agency would presumably continue to interpret the same statute in the same manner. Either *Moore* is an illustration of a separate sub-group of mootness cases or,—by avoiding exclusive reliance on the *Grant* and *Oil Workers* terminology and focusing instead on the likelihood of future injury to other then-unaffected private parties,—*Moore* effected a change in mootness law generally.

9. Note, 130 U. Pa. L. Rev. 772.

In contrast to *Moore*, which involved an inherently likely recurring effect of challenged conduct on a group which might or might not include the plaintiff himself, this Court declined to review the merits of two other election cases, *Brockington* v. *Rhodes*, 396 U. S. 41 (1969), and *Hall* v. *Beals*, 396 U. S. 45 (1969). *Brockington* and *Hall* involved situations in which the complaining party sought to have his name placed on the ballot as a candidate for a particular election (*Brockington*), and sought to be permitted to vote in a particular election (*Hall*), but was prevented from doing so pursuant to the operation of a statute which had subsequently been amended. By the time these cases reached this Court, the statutory amendments had been effected and the specific elections involved had been conducted. These cases were held to be moot since a repetition of the kind of injuries complained of could not recur in view of the statutory amendments. That is, in practical terms, no conceivable interest of either the individual complaining party or any others similarly situated could possibly be infringed in a similar manner in the future.

Reading the *Moore*, *Brockington* and *Hall* cases together, it is reasonable to deduce that this Court has effected a departure from the various tests previously followed in *Grant*, *Oil Workers* and *Sanders* and now relies, in mootness cases presenting important public question, on whether it is *possible* that certain challenged conduct will recur to the *private* plaintiff *or* the class of persons to which the plaintiff belongs. Conversely, the former cases may be read to merely create an additional basis for deciding a case on its merits when the future jeopardy to that class is "inherently likely" even though the prospective jeopardy to the private plaintiff himself may be merely "speculative." Finally, one may read *Moore*, assuming again that it is not merely representative of a special sub-group of cases, to give more specific meaning to *Oil Workers* in defining the degree of likelihood of recurrence which avoids mootness when *private* parties bring suit.

Nor do these authorities and possibilities exhaust the variables which courts' decisions have relied upon in determining whether cases are moot. In addition to the various approaches discussed above, which are based on assessments of probability of future effect, courts have declined to find a case moot when the challenged conduct is deemed "capable of repetition, yet evading review." In *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498 (1911), this Court employed the quoted language as a basis to uphold a *private* challenge to governmental conduct where there was no certainty or even inherent likelihood—but only a "mere possibility" that the challenging party would again be subjected to an injury such as he was then challenging. Indeed, the Court's focus was not at all on the degree of predictable future jeopardy to the plaintiff itself but rather on the need of the judicial system for a resolution of a problem which would otherwise continue to escape judicial scrutiny. It should also be noted that to still another legal scholar the doctrine of *Southern Pacific* is said to be restricted to those cases which involved recurring situations *without* regard to the identity or nature of the plaintiff and without regard to *his specific* problem.[10] In either event, *Southern Pacific* was concerned with the needs of the judicial system for means by which to resolve problems; it was not primarily concerned with any requirement to satisfy the criteria relied upon in the other mootness cases discussed *supra*.

The reasoning of *Southern Pacific* would also seem to underscore this Court's decision in *Sibron* v. *New York*, 392 U. S. 40 (1968). That was a criminal case in which a *private* challenge was mounted to an alleged improper police search. The Court's conclusion of non-mootness in that case could not be said to trace to a concern that the challenging party was "inherently likely" to be again affected by the same wrongful conduct or that the probability of such a recurrence was, as to him, more than "speculative." Rather, the Court was concerned that

10. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125 (1946).

the substantive issues presented in the case had a great potential impact on others and, unless adjudicated, would continue to evade judicial review.

Whatever the difficulty of reconciling the latter two decisions with *Moore*, *Oil Workers* and the "mere possibility" test of *Grant*, the task is compounded by the view of at least one commentator[11] that criminal cases such as *Sibron*, like election cases, constitute an independent area whose mootness rules may not be imported to the analysis or resolution of such issues in other areas of the law.

Coming now to the instant proceeding, this case presents a particularly apt illustration of the problems of the entire area. The underlying substantive question herein is one of substantial public importance, involving the propriety of a State's payment of public welfare funds to striking employees. Since strikes will continue to occur, the substantive dispute will therefore recur with certainty; states will continue paying benefits to strikers and unions' and employers' bargaining relationships will continue to be affected by the favorable or adverse impact, respectively, of such payments on the process of decision-making. While there is at least a "mere possibility" that the issue will again confront the immediate parties (*Grant*), there is an "inherent likelihood" (*Moore*) that the class of persons, i.e., employers, to which the *private* plaintiff belongs will be affected by a recurrence. Since the duration of a strike is unlikely to be sufficiently protracted to survive the appellate process, the question presented is short term in nature, "capable of repetition, yet evading review." (*Southern Pacific*). Thus, while the instant case would seem not to be moot under a variety of tests applied in a variety of cases, yet the court below, relying on *Oil Workers*, dismissed the case as being moot because the specific strike which gave rise to the entire action had terminated.

---

11. Note, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672 (1970).

While recognizing that the law of mootness has undergone substantial liberalization and that the instant case would not appear to be moot on the strength of recent decisions such as *Moore*, the court below nonetheless held it moot on the premise that in *labor relations cases*, the discontinuance of the challenged conduct necessarily results in mootness. Thus the court below segregated still another area from the mainstream of mootness law and created yet one more independent sub-group. Moreover, the court below rendered the mootness law in labor cases unique in that it would be *only* in such cases that the discontinuance of the underlying dispute automatically rendered a matter moot irrespective of other variables employed in other cases or other areas of the law. *Oil Workers* cannot reasonably be read to warrant such a result; nothing in that case requires a distinction between the mootness rules in labor cases and those which are appropriate in any other category or type of case.

Accordingly, adding to the confusion of the superabundance of tests and variables which may be derived from prior decisions of the courts in mootness cases, the court below added a further basis for legal distinction upon the apparent authority of this Court's decision in *Oil Workers*.

C. Evaluation of the Variables Courts Have Employed in Mootness Cases and an Alternative Proposal for Analyzing Mootness.

The various approaches which courts have used to determine whether one has a sufficient interest in the resolution of an issue, as divorced from its particular factual context, to prevent a finding of mootness have yielded the described inconsistency and uncertainty. They afford no rational basis for determining whether a case will be fully, competently or vigorously litigated. There is no warrant in logic or sound policy for applying one test in election cases such as *Moore* or criminal cases such as *Sibron*, applying a wholly different test in labor disputes such as *Oil Workers*, a third test when the government challenges private

action, and a fourth test when a private party acts as plaintiff. There is no assurance that the self-interest necessary to achieve vigorous litigation will obtain in one type of case rather than another. Further, the assessment of the plaintiff's *personal* stake in terms of probability of recurrence of challenged conduct does not explain the courts' adjudication of issues of public importance.

This public interest aspect is inherent in *Southern Pacific*, *Moore* and *Sibron*. It forms the basis for courts' need to determine issues of compelling importance which might otherwise evade review. Thus, where the issues raised involve significant questions that ought to be resolved, the requirement of probability of effect has been adjusted to allow resolution. Further, a number of lower federal courts have apparently adopted a public interest exception where, even though a case would otherwise be moot, the issues are of sufficient importance that they compel judicial resolution.[12] If the issues raised in a case are sufficiently important that they affect a broad category of persons and are likely to recur, there is no sound basis for rejecting an appeal because the appellant is unable to demonstrate for a certainty that a recurrence will affect him.[13]

---

12. See, e.g. *Friend* v. *United States*, 388 F. 2d 579, 581 (CADC, 1967); *Dyer* v. *SEC*, 266 F. 2d 33, 47 (CA 8); *cert. denied*, 361 U. S. 835 (1959); *Boggess* v. *Berry Corp.*, 233 F. 2d 389, 391 (CA 9, 1956); *contra, Campbell Soup Co.* v. *Martin*, 202 F. 2d 398, 399 (CA 5, 1953). While this Court has indicated the relevance of the public interest in mootness determination, see, e.g., *Grant, supra; Moore, supra; Sibron, supra*, it has not expressly relied on the "public interest" as the sole basis for determining the question of mootness. *Street Employees Div. 998* v. *Wisconsin Employment Relations Board*, 340 U. S. 416, 418 (1951).

13. The "public interest" component of the mootness doctrine has had great appeal to commentators in this area:

> "Not easy to weight, [the public interest in an adjudication on the merits] has seemed to some courts so pressing . . . as to justify a decision on the merits despite the fact that the decision could have no substantial effect on the parties who originally raised the question and that its usefulness would, as a result, be largely confined to the creation of precedent." (Citations omitted) (Note, *"Moot" Administrative Orders*, 53 Harv. L. Rev. 628, 630 (1940)).

The nature of the "interest" which a plaintiff should be required to possess in an issue to overcome a suggestion of mootness when relief in his case is otherwise inappropriate should be determined without reference to the continuum of probability-of-future-effect which courts today use as a test. That is, whether a recurring issue should be resolved by the courts ought not to depend upon the need for courts to measure the shades of differences between situations where such recurrence is "speculative," or "merely possible," or "probable," or "inherently likely" or "certain." Rather, it should be recognized that since self-interest is the motive which insures the proper functioning of the adversary judicial process, the fact that the appellant seeks to expend the time, money and effort to prosecute an appeal constitutes adequate assurance that he will litigate the issues with vigor. His self-interest may be based upon his own appraisal of the probability that a recurrence of the conduct complained of will affect him adversely. Perhaps it may be based on an identity of interest with those similarly situated. In some instances it may reflect an association's efforts to protect its members' interests from future jeopardy.[14] In any event, recognition of this principle reflects the realities of much present day litigation challenging governmental action and, rather than diminishing the quality of litigation, serves to enhance it.[15]

Recognition of the legal adequacy of the personal stake of an appellant who, for whatever reason, perceives a sufficient self-

14. That such associational participation on its members' behalf demonstrates an interest sufficient to overcome objections to the adverseness principle was apparently recognized by the First Circuit in *Grinnell* v. *Hackett*, 475 F. 2d 449, 82 LRRM 2986 (1973), which involved the same underlying substantive issue as is presented by the instant case. In *Grinnell* the Chamber was allowed to intervene, and thus prevent mootness, because it represented "many other employers . . ., as to at least some of whom the issue is certain to recur." *Id.*, at 2989-90.

15. This interest has been recognized by Professor Jaffe in his argument that "ideological" plaintiffs who challenge governmental action merely as concerned citizens should be accorded standing. See, Jaffe, *The Citizen As Litigant In Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033 (1968).

interest to warrant prosecuting an appeal, does not destroy the necessary adversity required for vigorous litigation. Where the issue is important and there is a possibility of recurrence of the disputed conduct, the government, as defender of its actions, has an equally sufficient interest in presenting a well-argued case as it does when it is functioning as prosecutor;[16] it is surely just as important that the government refrain from unlawful conduct as it is that private persons do so. Since any unlawful activity engaged in by the government in the administration of a public law is bound to affect a large class of people and thus raise important issues, vindication of the public interest by private parties should not depend on the uncertainty engendered by differing tests of relative probability of recurrence. An even-handed and consistent application of the *Grant* test to all plaintiffs in all areas of the law would accomplish this end.

Although the mootness doctrine in "recurrence" cases is inconsistently applied, there is one policy thread that runs throughout. In cases determined not to be moot, the real concern of the courts has seemed to be the avoidance of the potential for continuous litigation of the same issues when those issues affect large segments of the public. This concern is manifested in the cases as an expression of the "public interest". While cases which have been found not to be moot can be read to share this concern, there are other cases, however, which have been held moot (such as *Oil Workers, supra*) which would appear to have warranted a different result for these same reasons.

This concern for the resolution of issues of public interest resulted in a finding of "justiciability" in the first "recurrence"

16. When the challenged conduct is engaged in by the government it is more than likely to recur absent a judgment condemning it as unlawful. The possibility that the issue in question will recur insures that the government, as defender of its policies, is a recurrent litigant who will be aware of the impact that an adverse determination will have on its future activities. Its adverse interest is thus assured. See, e.g. *Carroll* v. *President & Commissioners of Princess Anne County*, 394 U. S. 175 (1968).

case, *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290 (1897). *Trans-Missouri*, the conceptual progenitor of *Grant, supra*, involved an anti-trust action in which the government sought dissolution and injunction. During the pendency of the appeal, the defendant voluntarily dissolved. The Court held the case not to be moot saying:

> "There mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the legality of the agreement itself for the carrying out of which the association is formed . . ." *Id.*, at 308.

The defendants were enjoined from re-combining in the future. This is significant because the theory prevalent at the time was that mootness was a remedial concept, and where this Court could not render an effective decree, the matter was moot.[17] In *Trans-Missouri* there was nothing to enjoin since the defendants had ceased their allegedly unlawful combination, and the Court's decree would have no effect. However, the Court was concerned with the possibility that the "defendants would, by a series of successive re-combinations and dissolutions, engage the government in continuous litigation so that the 'rights of the public' in obtaining judicial resolution of the underlying issue would be thwarted." *Id.*, 305-6, 309-10.

Similarly, in *Southern Pacific, supra*, this Court emphasized the importance of judicial review to all carriers who might possibly be affected by the ICC's policy of promulgating short-term orders. And in more recent cases, this concern is more manifest. In *Sibron, supra*, the Court expressly stated that it was concerned with ". . . the vital importance of keeping open the avenues of judicial review . . .", *Id.*, at 52, and in *Moore, supra*, where the underlying issue required resolution because it reflected a ". . . continuing controversy in the federal-state area . . .", *Id.*, at 681.

---

17. See *Singer Mfg. Co.* v. *Wright*, 141 U. S. 696 (1891); *Ex Parte Baez*, 177 U. S. 378 (1900).

In fashioning a rule which may predictably be applied in cases raising a question of mootness, the policy determinations expressed in *Southern Pacific*, *Sibron* and *Moore* should be superimposed upon this Court's requirement, as expressed in *Flast* v. *Cohen*, *supra*, that justiciability is intended to insure that

> ". . . the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the . . . challenge will be made in a form traditionally thought capable of judicial resolution." (at page 106.)

In short, it is posited here that the proper application of the mootness doctrine demands an examination of the following criteria in cases where the immediate parties to the proceeding have adjusted their dispute prior to judicial consideration of the case or specific relief is for any other reason then inappropriate. Such cases should not be deemed moot only when each of the following tests is satisfied:

1) Whether the issue to be decided is one of general importance, affecting broad segments of the public or a substantial group represented by the plaintiff or membership represented by an association; that is, whether by settling a significant Constitutional, statutory or other legal question the court will so resolve the conflicting claims of right between the numerous groups of affected persons as to render unnecessary much future litigation concerning the existence or nature of such adjudicated rights;

2) Whether the issue is one which may recur; "mere possibility" of recurrence should be the only relevant measure of continuing probability of effect;

3) Whether there exist some parties to the proceeding who are willing and prepared to litigate the opposing merits of the issues thoroughly, vigorously and conclusively; and

4) Whether the proceeding involved, at its inception, a genuine dispute among legitimate contending parties where some injury was suffered or threatened as a consequence of challenged conduct.

If these criteria are satisfied,—that is, the issue arose in a legitimately adverse context and is worth deciding on its merits, may recur to jeopardize others' interests and will be earnestly litigated,—then courts should proceed to an adjudication of that issue. Restricted to these variables, the analysis of mootness cases will be freed from the current excess of tests and categories and will afford a measure of predictability without loss of courts' flexibility within the confines of these proposed criteria to make such judgments as appear appropriate in the case at hand. Under these tests, cases of genuine and far reaching significance which warrant judicial attention will not be deprived of decision because, while the propriety of challenged conduct has not been resolved, the conduct itself has ceased. Similarly, it will become clear that the appropriate litigants in such cases will be any persons actually affected by the substantive question involved, whether they be individuals or groups, named plaintiffs or others who intervene because of the potential advantage or jeopardy promised or threatened as a consequence of the litigation.[18] And the standards will be applied uniformly to all who meet the stated criteria, without regard to what is in these cases the artificial distinction between private and governmental parties. A further meritorious consequence of the adoption of the proposed tests will be to eliminate special rules for special sub-classes of cases, whether election cases, criminal cases or labor relations cases. There is no inherent necessity, for example, for treating labor cases differently than any others for purposes of determining mootness.

18. The propriety and value of organizations such as the Chamber functioning to protect their members' interests and thereby preventing cases from being held moot because of the continuing jeopardy to *some* members of the organization has been noted and approved in *Sierra Club* v. *Morton*, 405 U. S. 727 (1972) and *Grinnell Corp.* v. *Hackett*, *supra*.

For the questions presented in labor relations cases are of no less major consequence than those presented in any other field, no less infrequently present Constitutional problems and balancing requirements between statutory and Constitutional rights, recur no more infrequently than major issues in other areas, are no less prone to associational representation of members' interests and are no less earnestly pursued and litigated in the courts. On the contrary, arguments may well be advanced to demonstrate that in the often highly-charged atmosphere of labor relations the degree of parties' concern and need for the settlement of potentially difficult future questions is more intense than may be typical elsewhere.[19]

While the adoption of this proposal would generate important advantages to the efficient and logical development of the judicial process, there would be no danger of opening the judicial flood-gates to a greatly increased volume of cases. The proposed tests contain sufficient internal limitations for this to occur. Thus, any case which fails to commence in a genuinely adverse context or which fails to involve important principles of general relevance and wide application or, however interesting, does not involve some likelihood of recurrence will not engage the judicial process. The proposed formulation is basically an ordered limitation of judicial access; any case which survives its terms ought to be decided by the courts. Its adoption would result in a doctrine which would be more readily and logically understood and applied in labor relations and elsewhere.

---

19. The underlying substantive issue presented below has given rise to substantial recent litigation demonstrating its significance as an issue, its recurring quality and the willingness of those who are and who may be affected by such recurrence to litigate the matter. See, *e.g., ITT* v. *Minter,* 435 F. 2d 989 (CA 1, 1970); *Grinnell* v. *Hackett, supra; Almacs* v. *Hackett,* 311 F. Supp. 964 (D. R. I., 1970); *Francis* v. *Davidson,* 340 F. Supp. 351 (D. Md.), *aff'd. per curiam,* 409 U. S. 904 (1972); *Russo* v. *Kirby,* 453 F. 2d 548 (CA 2, 1971); *Dow Chemical Co.* v. *Taylor,* .... F. Supp. ...., 57 F. R. D. 105 (1972); *Lascaris* v. *Wyman,* .... N. Y. .... (1973), cert. den. 94 S. Ct. 165 (Oct. 9, 1973); *New York Telephone Co., et al.* v. *N. Y. Dept. of Labor,* No. 73 Civ. 4557 (S. D. N. Y., *pending*).

"If the Court is confronted with a substantial likelihood that an issue it believes moot will always arrive there in the same condition because of the inherent nature of the issue, the Court should not refuse review on the basis of mootness. This policy overrides the first policy of ensuring the effective functioning of the adversary system, so demonstration of the the litigants' personal stake should not be required. The Court must acknowledge that the real choice is not between taking or not taking risks with the quality of the judicial process, but between securing or not securing the values of appellate review—stability, uniformity, and objectivity."[20]

D. There Exists an Irreconcilable Conflict Among the Circuits as Well as Between the Circuits and This Court's Decisions Which Would Be Resolved by the Adoption of the Previously Proposed Ordering and Synthesis of Mootness Criteria.

The adoption of the mootness tests proposed above would promote harmony and uniformity in mootness analysis in the labor field in place of courts' current disharmony and diversity.

As has been previously noted herein, the court below, while conceding great doubt and inviting this Court's guidance, held the instant case moot because the union's strike had been discontinued prior to judicial consideration of the strike-related issue which gave rise to the suit. This result was said to be required by the fact that in labor relations cases the absence of a viable dispute rendered a case moot irrespective of the existence of other variables or criteria which would lead courts to hold otherwise in fields other than labor law.

At the outset, that view of the function of mootness in labor relations cases, though premised on the assumed holding of this Court in *Oil Workers,* is in conflict with a substantial number of cases also decided by this Court in the same labor field and in which a decision on the merits had been rendered although the challenged conduct had ceased long before. Among such

20. Comment, 83 Harv. L. Rev. 1672 at 1692 (1970).

decisions are *Bakery Sales Drivers Union* v. *Wagshal*, 333 U. S. 437, 442; *NLRB* v. *Mexia Mills, Inc.*, 339 U. S. 563, 567; *NLRB* v. *Raytheon Co.*, 398 U. S. 25; and *Local 1976, United Brotherhood of Carpenters and Joiners, et al.* v. *NLRB*, 357 U. S. 93. In the last cited case, for example, a union which had been charged with engaging in unlawful picketing had agreed to cease such conduct after the filing of those charges but prior to the issuance of any formal administrative Complaint. The union had, moreover, as part of its cessation of unlawful conduct, fully settled the case with the complaining employer and had executed a collective bargaining agreement containing an explicit pledge not to resume striking. To the contention that the case was moot this Court disagreed and held ". . . the controversy was not rendered moot . . . we cannot say that there was no danger of continued violation."

Similarly, the Courts of Appeals have regularly adjudicated labor issues over objection that the parties' settlement of their dispute or the cessation for other reasons of the alleged improper conduct rendered the cases moot. Illustrative cases include *NLRB* v. *United Hatters, et al.*, 286 F. 2d 950 (CA 4, 1961):

> "Nor can we adopt the suggested dismissal of the petition as now presenting only an academic question inasmuch as the pickets have long since been withdrawn.";

NLRB v. *Local 182, IBT*, 314 F. 2d 53 (CA 2, 1963); *NLRB* v. *Plumbers Union of Nassau County, Local 457, et al.*, 299 F. 2d 497 (CA 2, 1962); *NLRB* v. *Globe Wernicke Systems Co.*, 336 F. 2d 589 (CA 6, 1964):

> "Abandonment of an unfair labor practice does not cause the controversy to become moot.";

NLRB v. *Marsh Supermarkets, Inc.*, 327 F. 2d 109 (CA 7, 1963):

> "If the court makes no decision as to the Respondent's former conduct, it may then be repeated; hence a decision as to its legality will not be a futile exercise of jurisdiction."

The Third Circuit itself, in contrast to its decision herein, declined to hold a case moot on application for an injunction by the National Labor Relations Board despite prior full compliance with all aspects of the Board's remedial order. *NLRB* v. *Local 65, Carpenters Union*, 318 F. 2d 419 (CA 3, 1963). The latter case was one in which the *government* was the moving party. Lest it be assumed that this factor militates against the conclusion that the Third Circuit itself has rendered inconsistent decisions in this area, this Court's attention is directed to another Third Circuit opinion which was issued *subsequent* to the instant case and which involved two opposing *private* parties. In *Pittsburgh Newspaper Printing Pressmen's Union No. 9* v. *Pittsburgh Press Co. et al.*, ... F. 2d ....., 83 LRRM 2349 (decided May 29, 1973), that court held that the appellant-unions' appeal from the district court's denial of an injunction to restrain the employer's reduction of number of work shifts pending arbitration was *not* moot despite the fact that the parties' dispute had since been resolved through arbitration. The court held that ". . . this appeal is not moot because the issues involved are 'capable of repetition yet evading review' ". In its decision, the court failed to mention, much less distinguish, the instant case decided shortly before.

In order to highlight the conflict which afflicts this area, this Court is referred to still another Third Circuit decision in which the court held moot a *private* party's appeal of a district court's improper limitation of its participatory rights under Section 10(l) of the National Labor Relations Act. *Samoff* v. *IAM, Lodge No. 1*, 420 F. 2d 952 (CA 3, 1969). The court's decision holding the appeal to be moot was premised on the settlement of the dispute which gave rise to the proceedings in which the appellant wished to exercise a participatory role. *Samoff* would thus appear to be consistent with the decision below but inconsistent with a dissimilar panel's subsequent holding in *Pittsburgh Press.*

However, shortly after *Samoff* was decided the identical factual and legal situation arose in the Eighth Circuit. *Terminal*

Freight Cooperative Assn. et al. v. *Solien,* 440 F. 2d 124 (CA 8, 1971). The Eighth Circuit reached a contrary result:

> "In [*Samoff*], the Third Circuit held the execution of a collective bargaining agreement mooted an appeal on a similar issue. We are not disposed to follow this holding as we think it is contrary to the teaching of the Supreme Court in *United States* v. *W. T. Grant Co.* . . ."

In further explication of its holding,—in a case brought by *private* parties protesting an alleged breach of rights guaranteed under the labor laws,—the Eighth Circuit expressly relied on mootness doctrine which had arisen in non-labor areas in suits brought by the government:

> "We do not think this case is moot because the probability of repetition of unlawful secondary boycott activity by the Union in the instant case is sufficient to satisfy the 'mere probability' test articulated in *United States* v. *W. T. Grant Co.* . . . In our view, a case is justiciable 'if there is a probability that the challenging party will be affected should recurrence take place' . . . We believe that the doctrine of mootness should not be used to perpetually frustrate review of issues of public importance arising in otherwise justiciable cases . . ." (Quoting Comment, 83 Harv. L. Rev. 1672, 1692)

In summary, there can be no serious argument with the proposition that the law regarding mootness, both in labor relations cases as well as in other fields of law, is in serious disorder. There is authority supporting altogether inconsistent results and a demonstrable and irreconcilable conflict among the circuits themselves. This result is presumably traceable to the fact that so many different tests for different circumstances are inferable from the decided cases. It is submitted that the adoption of a single set of criteria for all fields and all classes of litigants is needed and is desirable. The criteria suggested herein would appear to harmonize the principal authorities of this Court, would permit essential flexibility while affording useable guidelines and would promote order and predictability.

II.

THE MERITS OF THE UNDERLYING DISPUTE.

The Chamber supports the view of the petitioner herein that payment by States of welfare subsidies to striking employees is incompatible with the federal regulatory scheme as contained in the National Labor Relations Act. Such payments by the States violate the Supremacy Clause of the Federal Constitution in that they intrude into and disrupt the free collective bargaining relationship which the Labor Act intended should be the means by which parties mutually resolved their labor disputes.

Section 1 of the Labor Act provides that

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . ."

The meaning of the federal scheme for dispute resolution in the labor arena, a field occupied by federal regulation, has been clarified by this Court. Thus, according to *N. L. R. B.* v. *Insurance Agents Union*, 361 U. S. 477, 489 (1960), the federal scheme provides that parties' bargaining relationship involves a "brute contest of economic power." That the parties must be left to a contest of their *own* economic weapons and resources is a necessary consequence of the observation in *H. K. Porter* v. *N. L. R. B.*, 397 U. S. 99, 108 (1970), that ". . . the results of the contest [are left] to the bargaining strengths of the parties."

It is, thus, fundamental to the federal statutory scheme that in a dispute in labor relations there shall be no public interference in the private parties' bargaining relationship. This is an injunction which applies unquestionably to the States:

> "For a State to impinge on the area of labor combat designed to be free is quite as much an obstruction of

> Federal policy as if the State were to declare picketing free for purposes of or by methods which the federal Act prohibits."[21]

The Chamber submits, therefore, for these reasons as well as those which are contained in the petitioners' brief, that subsidies paid by the State to striking employees violates the Congressionally created necessity for neutrality in private collective bargaining, interferes with this Court's determinations that labor disputes should be settled according to the play of the combatants' resources and thus violates the Supremacy Clause of the federal Constitution. As a matter of law and policy, collective bargaining is a system of economic tension predicated on the parties' respective strength and resolve. Artificial supports to one side or the other, —whether by governmental subsidies to management or welfare payments to strikers, —constitute proscribed intrusions inconsistent with the Congressional design and the Constitutional provision which renders the federal scheme paramount.

The issue of the propriety of such welfare payments to strikers is one which this Court should resolve in this case. While the court below declined to do so when it held the case moot, all of the vital preconditions for a decision of that question are satisfied.

First, the question presented raises a matter of law for which it does not appear that an extensive factual record is warranted. The parties' dispute concerns their disagreement as to whether the federal scheme does prohibit a governmental source giving aid to one of the parties to a strike where the aid is premised on the existence of that strike. What is involved is *not* a question as to whether aid given independently of the existence of the strike should be discontinued because of or during the strike. Rather, the aid involved is given solely in order to afford assistance to the recipient during his strike. The purpose of the State's payments are not in dispute. Given the agreed

21. *Garner* v. *Teamsters Union*, 346 U. S. 485, 500 (1953).

nature and purpose of this assistance, the federal scheme of the Labor Act as it has been elucidated in *Insurance Agents* and *H. K. Porter*, and the judicially approved injunction against State's interference in this federal area as described in *Garner*, the manner in which these factors interrelate constitutes a matter of law which this Court can now resolve.

Second, the need for such a resolution is beyond question. Within the last few years the issue has arisen in a variety of courts and, so long as States continue to make such payments, similar cases will continue to arise.[22] A question which will necessarily frequently recur, involving the need to resolve a conflict between sovereignties and an interpretation of the breadth of the federal labor laws is worthy of this Court's attention. Indeed, even should this Court decline at this time to effect an ultimate determination of this issue, some guidance could appropriately be given to those many courts which will continue to be confronted by the problem and by the competing Constitutional and statutory claims which the contending parties will urge. Direction with respect to the nature and scope of appropriate proof will, at minimum, produce an ultimate judicial economy and more direct and speedy resolution of this important matter.

Third, this case is not moot and, in accordance with the principles developed in the first part of this brief, the case represents a particularly apt illustration of a matter ripe for decision by this Court.

The first major criterion in an analysis of mootness relates to the general importance of the question presented and the range of its effect. As noted above, the issues involved here raise substantial statutory and Constitutional questions going to the heart of the federal labor scheme and its impact on State conduct. The extent of the interest which has been generated by these matters is evidenced by the volume of litigation which has been spawned by attempts to resolve them. Without doubt, a

22. See footnotes at pages 19, 20 of Petitioners' Brief.

decision on the merits by this Court will put to rest uncertainties in the law and much further litigation. The related test of frequency of recurrance is also met. Moreover, recurrance in this area is a multi-facted variable. Unions will surely continue to strike and States, barring prohibition by this Court, will continue to make payments to strikers as they have in the past. In addition to such measures of continuing future effect, however, there must be added the disruption of the parties' collective bargaining relationship. For the possibility of strike-related benefits will continue to exert some inducement to unions or employees to risk the consequences of a strike and thus affect their determination to adhere to hard positions. Similarly, the fact that such benefits would be paid their striking employees cannot but also exert a major effect on employers who measure their own bargaining positions and the consequence of a strike's prolongation due to the assistance given strikers by the State. Thus, the practice of States to make such payments results in an intrusion into the parties' collective bargaining relationship of factors entirely extrinsic to the dispute itself or the parties' strength or will; it creates an unwarranted dislocation in the free play of economic forces and amounts to an intervention on one side of the dispute.

The third principal variable in mootness analysis involves the requirement that there exist parties prepared and willing to litigate the issues thoroughly, vigorously and conclusively. The fact that the petitioner has brought this case to this Court is itself evidence of the satisfaction of this criterion. However, beyond the petitioner, the involvement of the Chamber assures such a thorough and conclusive litigation. For the Chamber has repeatedly and intensely sought to obtain a resolution of the question presented herein on behalf of its membership. To that end, it has been the Chamber which, *as a party*, has litigated the matter in *Dow Chemical Co.*, *Grinnell*, and *Russo*, *supra*. As the Chamber has indicated in its pending Motion for Leave to Present Oral Argument, the certitude that the question presented will continue to affect the Chamber's members in the future

renders the Chamber, in its representative capacity, more a party in interest in this case than the named parties, and assures the necessary adverseness and thoroughness of the litigation.[23]

Finally, although the strike which gave rise to the filing of this case has, during the appellate process, been terminated, the case did involve at its inception a genuine dispute among legitimately adverse parties threatening actual jeopardy as a consequence of challenged conduct. This consideration, in combination with the other criteria discussed above, establish that the case is not moot and should engage the judicial process in a resolution of the important and recurring issue presented.

23. The nature of the Chamber's interest in the substance of the welfare-for-striker question led the court below to observe that the Chamber, an *amicus*, was the real party in interest in this case; this consideration also led the court in *Grinnell, supra*, to hold that case not moot in reliance upon the recurring jeopardy faced by the Chamber's members from States' grant of welfare benefits to strikers.

CONCLUSION.

For the reasons stated herein, together with those additionally argued by the petitioner, the Court is urged to reverse the court below with respect to the question of mootness and to reverse the District Court with respect of the propriety of States' payment of welfare benefits to striking employees.

Respectfully submitted,

MILTON SMITH,
General Counsel,
RICHARD BERMAN,
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H Street, N. W.,
Washington, D. C.,
GERARD C. SMETANA,
925 South Homan Avenue,
Chicago, Illinois 60607,
JERRY KRONENBERG,
Borovsky, Ehrlich & Kronenberg,
120 South LaSalle Street,
Chicago, Illinois 60603.

Of Counsel:
COLE, ZYLSTRA & RAYWID,
2011 Eye Street, N. W.,
Washington, D. C.

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
DEC 26 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; and A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION NO. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS, McCORKLE AND ENGELMAN

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,
Attorney for Respondents, Lloyd W. McCorkle, Commissioner of Institutions and Agencies, and Irving J. Engelman, Director, Division of Public Welfare,
State House Annex,
Trenton, New Jersey 08625.

STEPHEN SKILLMAN,
First Assistant Attorney General,
Of Counsel and on the Brief.

JANE SOMMER,
PAUL N. WATTER,
Deputy Attorneys General,
On the Brief.

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTIONS PRESENTED	1
COUNTER-STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT—The states may pay welfare benefits to strikers, because the provisions of the Social Security Act, which deal comprehensively with conditions of eligibility under the federal categorical assistance programs, do not prohibit such benefits	5
CONCLUSION	22

Cases Cited

Carleson v. Remillard, 406 U. S. 598 (1972) 11

DeVeau v. Braisted, 363 U. S. 144 (1960) 14-16

Francis v. Davidson, 340 F. Supp. 351 (D. Md. 1972) aff'd 409 U. S. 904 (1972) 14, 16, 17

Grinnell Corp. v. Hackett, 475 F. 2d 449 (1st Cir. 1973) cert. den. 94 S. Ct. 164 (1973) 17, 18

ITT Lamp Division of Int. Telephone & T. Co. v. Minter, 435 F. 2d 989 (1st Cir. 1970) cert. den. 402 U. S. 933 (1971) 17, 18

King v. Smith, 392 U. S. 309 (1968) 5, 11

Lascaris v. Wyman, 61 Misc. 2d 202, 305 N. Y. Supp. 212 (1969) 13

Nash v. Florida Industrial Commission, 389 U. S. 235 (1967) 16

PAGE

New York State Department of Social Services v. Dublino, 93 S. Ct. 2507 (1973) 9, 11, 13, 16

Railroad Telegraphers v. Chicago & N.W.R. Co., 362 U. S. 330 (1960) 18

Rosado v. Wyman, 397 U. S. 397 (1970) 5, 14

San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959) 16

Strat-o-Seal v. Scott, 72 Ill. App. 2d 480, 218 N.E. 2d 227 (1966) 13

Townsend v. Swank, 404 U. S. 282 (1971) 11

Weber v. Anheuser-Busch, Inc., 348 U. S. 468 (1955) 16

X. V. McCorkle, 333 F. Supp. 1109 (D. N. J. 1970) modified sub. nom, Engelman v. Amos, 404 U. S. 23 (1971) 21

Statutes Cited

Federal Emergency Relief Act 6

Federal Social Security Act 1, 2, 4-8, 11, 17, 22

Labor Management Relations Act of 1947 ..... 2, 8

Labor-Management Reporting and Disclosure Act of 1959 15

National Labor Relations Act 1, 4, 5

N.J.S.A. 44:8-107 2

N.J.S.A. 44:10-1 2

New York Waterfront Commission Act 14

Railroad Employment Insurance Act 6, 10

49 Stat. 629 (1935) 5

PAGE

53 Stat. 1379 (1939) 8
64 Stat. 551 (1950) 6
549 (1950) 8
70 Stat. 848 (1956) 8
72 Stat. 1048 (1958) 8
75 Stat. 75 (1961) 8
76 Stat. 185 (1962) 8
79 Stat. 414 (1965) 8
81 Stat. 877 (1968) 8
85 Stat. 802 (1971) 8
86 Stat. 1485 (1972) 8
7 U.S.C.:
Sec. 2014(c) 10
29 U.S.C.:
Sec. 141 2
42 U.S.C.:
Sec. 601 2
Sec. 602(a)(8) 21
Sec. 602(a)(10) 11
Sec. 602(a)(19) 21
Sec. 606(a) 5
Sec. 1304 7
45 U.S.C.:
Sec. 351 6
Sec. 354 (a-2) (iii) 7
Unemployment Compensation Act 7

PAGE

Regulation Cited

7 C.F.R. Sec. 271.3 10

Other Authorities Cited

A. Thieblot and R. Cowin, Welfare and Strikes: The Use of Public Funds to Support Strikers (1972):

pp. 34-36 6

pp. 36-43 8

pp. 9-12, 36-38, 143-185 13

Bureau of Social Science Research, Inc., Legislative History of the Aid to Dependent Children Program (1970):

pp. 12-16 6

pp. 89-267 8

pp. 159-160 ..... 8, 9

pp. 198-204 9

Comment, Welfare Assistance to Strikers in Need: The Protestant Ethic Revisited, 67 Nw. U. L. Rev. (1972):

p. 245 19

79 Cong. Rec. 5782, 9284 (1935) 7

118 Cong. Rec. 16815, 17049-17052 10

Dept. of Health, Education and Welfare, Publication No. 74-03100, National Center for Social Statistics Rept. A-2 (7/73), Public Assistance Statistics Tables 1 and 2 13

H.R. Rep. No. 91-612, 91st Cong., 1st Sess. 18 (1969) 10

PAGE

H.R. Rep. No. 91-1402, 91st Cong., 2d Sess. 11 (1970) 11

I. Bernstein, Turbulent Years: A History of the American Worker, 1933-1941 (1970):

pp. 307-308 6

1 N.L.R.B., Legislative History of the Labor Management Relations Act, 1947 (1948):

pp. 303-304 8

S. Rep. No. 92-1230, 92nd Cong., 2d Sess. 108, 472-473 (1972) 9

S. 560, 92nd Cong., 1st Sess. (1971) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; and A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION NO. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS, McCORKLE AND ENGELMAN

Counter-Statement of Questions Presented

1. Do the provisions of the Social Security Act governing the federal categorical assistance programs indicate

a congressional intention to prohibit the payment of welfare to strikers?

2. Is it appropriate to look to the general provisions of the National Labor Relations Act to find the intention of Congress concerning the payment of welfare to strikers where the conditions of eligibility for welfare are set forth specifically and comprehensively in the Social Security Act?

Counter-Statement of the Case

On June 10, 1971, two affiliated New Jersey corporations, Super Tire Engineering Company and Supercap Corporation (referred to hereinafter as "Super Tire"), and their President and Chief Executive Officer, filed suit in the Federal District Court for New Jersey, alleging that the employees of Super Tire were on strike and that many of the strikers were receiving public assistance under the Assistance for Dependent Children (N.J.S.A. 44:10-1, *et seq.*) and General Assistance (N.J.S.A. 44:8-107) laws of the State of New Jersey (App. 12-15). The complaint claimed *inter alia* that the payment of public assistance to strikers is not authorized by the New Jersey welfare statutes, that it is contrary to the provisions of the Federal Social Security Act governing the AFDC program (42 U.S.C. §601 *et seq.*) and that it conflicts with the provisions of the Labor Management Relations Act of 1947 (29 U.S.C. §141 *et seq.*) guaranteeing free collective bargaining. The named defendants in the original complaint were the New Jersey Commissioner of Institutions and Agencies and Director of the Division of Public Welfare, who are the administrative officials responsible for the state's welfare programs, and two county welfare offi-

cials.* Subsequently, the collective bargaining representative of Super Tire's employees, Teamsters Local Union No. 66, was granted leave to intervene as a defendant (App. 1).

The matter was brought before the District Court on June 24, 1971 on the motion of Super Tire for a preliminary injunction (App. 26-35). The defendant state officials moved on the return date to dismiss the complaint for failure to state a cause of action (App. 37) and the parties agreed that the case should be determined on the merits at that time (App. 45). After hearing the arguments of counsel, the District Court granted defendants' motion to dismiss (App. 46).

An appeal was then taken by Super Tire to the Third Circuit Court of Appeals which, with Judge Gibbons dissenting, dismissed the appeal as moot because the strike out of which it arose had ended, and directed the District Court, on remand, to vacate its judgment and to dismiss the complaint as moot (App. 47-74).

After a petition for rehearing in banc filed by the Chamber of Commerce of the United States of America was denied by the Third Circuit (App. 108), Super Tire filed a Petition for Writ of Certiorari. Although its petition was concerned mostly with the Third Circuit's holding of mootness, the third question presented was: "Does the State grant of welfare assistance to strikers contravene federal labor policy by insulating one party—the striking union—from the economic disadvantages of a strike, and thus deviate from the State's required neutral position in collective bargaining?" The response filed by

* The Attorney General of New Jersey represents only the two state officials. The county welfare officials have not participated actively in the litigation.

the Attorney General of New Jersey to the petition indicated that the State would not take a position on whether the Court should review the Third Circuit's dismissal on grounds of mootness, since it had not urged disposition of the case on this ground. Consistent with that position, this brief is limited to a discussion of whether Congress has prohibited the payment of welfare benefits to strikers.

Summary of Argument

The right of strikers to receive welfare benefits is a question of basic eligibility under the provisions of the federal categorical assistance programs. Since Congress has included comprehensive provisions dealing with conditions of eligibility in the pertinent sections of the Social Security Act, the Court should look to the Social Security Act rather than the National Labor Relations Act to ascertain the intent of Congress concerning the payment of welfare benefits to strikers. A review of the legislative history of that Act and related statutes shows that Congress has been aware of the controversy concerning the payment of welfare benefits to strikers but that it has refrained from enacting any prohibition against such benefits. Furthermore, since any restriction upon the payment of such benefits would raise complex policy questions, such as whether ineligibility should extend to the entire family of a striker, the subject is inherently one which Congress would have to deal with by express provisions in the Social Security Act if it intended to establish a prohibition. Therefore, the Court should find that the absence of any prohibition in the Social Security Act against the payment of welfare to strikers leaves the states free to pay such benefits.

ARGUMENT

The states may pay welfare benefits to strikers, because the provisions of the Social Security Act, which deal comprehensively with conditions of eligibility under the federal categorical assistance programs, do not prohibit such benefits.

This case involves the interpretation of the provisions of the Federal Social Security Act establishing the program of Aid to Families with Dependent Children (hereinafter AFDC), as they relate to the payment of benefits to families in which a wage earner is on strike, and the impact, if any, of the National Labor Relations Act (hereinafter NLRA) upon the interpretation of those provisions. Since the case turns on the intent of Congress in enacting the Social Security Act and the NLRA, it is appriopriate to review the relevant legislative history of these acts and their later amendments.

The federal AFDC program provides financial aid on a joint federal-state basis for needy children who have been "deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent" and are living with any one of a specified group of relatives. 42 U.S.C. §606(a). See generally *King* v. *Smith*, 392 U. S. 309 (1968). When a state elects to participate in the AFDC program, it is entitled to matching funds in accordance with the statutory program only if its AFDC program, as embodied in its "state plan," complies with the requirements of the Social Security Act. *Rosado* v. *Wyman*, 397 U. S. 397 (1970). As originally enacted, the benefits of the AFDC program were limited to needy children themselves. 49 Stat. 629 (1935). By a 1950 amend-

ment, benefits also may be paid to meet the needs of the caretaker relative of a dependent child. 64 Stat. 551 (1950). Neither the original Act nor the 1950 amendment conditioned eligibility for AFDC benefits for either dependent children or their relatives on whether they were employed or available for work. The only criteria for eligibility were that (1) a dependent child had been deprived of the support of a parent by virtue of death, disability or absence from the home, and (2) the need requirements set by the State had been met. In short, the availability of AFDC benefits revolved solely around the *needs* of eligible families.

Consistent with these objectives, there is no suggestion in the legislative history that Congress intended to establish any barrier to the receipt of benefits by families which include individuals who are on strike. While there was no specific discussion of this subject at the time of the enactment of the original legislation, the problem was not one of which congressmen in the 1930's would have been unaware. It is clear that benefits had been paid to strikers under the Federal Emergency Relief Act, which was the immediate predecessor of the categorical assistance provisions of the Social Security Act (see Bureau of Social Science Research, Inc., *Legislative History of the Aid to Dependent Children Program* 12-16 (1970)), and that such payments had been the subject of considerable controversy during the period immediately preceding enactment of the Social Security Act. See A. Thieblot and R. Cowin, *Welfare and Strikes: The Use of Public Funds to Support Strikers*, 34-36 (1972); I. Bernstein, *Turbulent Years: A History of the American Worker, 1933-1941*, 307-308 (1970). Furthermore, the Railroad Employment Insurance Act (45 U.S.C. §351, *et seq.*), enacted in 1933, provided compensation for strikers under

specified conditions. 45 U.S.C. §354 (a-2) (iii). One commentator has observed of the Administration's position in those years:

> "The position taken by Hopkins and the New Deal Administration toward welfare payments to strikers was consistent with their belief that sound public policy required governmental assistance to unions if collective bargaining and equality of union power with that of management were to be achieved. Just as the Wagner Act sought to encourage collective bargaining by enhancing union power, so welfare payments to strikers sought to sustain unions when they required assistance." A. Thieblot and R. Cowin, *supra*, at 35.

If Congress had desired to prohibit this practice under the categorical assistance provisions of the Social Security Act of 1935, it could easily have inserted a provision to this effect. Instead, it limited the conditions of eligibility to need alone. Similarly, if Congress had desired to prohibit payments to strikers under the Unemployment Compensation Act (42 U.S.C. §1304), also enacted in 1935, it could have done so. Instead, it elected to confer substantial discretion upon the states to determine their own conditions of eligibility. (See, 79 Cong. Rec. 5782 (1935) (remarks of Congressman Cooper); *Id.* at 9284 (remarks of Senator Wagner)). Finally, the NLRA, also enacted in 1935, established a comprehensive statutory code for industrial relations, but Congress was silent with respect to the payment of public funds to strikers. It thus appears that in enacting the NLRA, the Unemployment Compensation Act and the AFDC provisions of the Social Security Act in 1935, Congress had ample opportunity to enact a prohibition against the

payment of public funds to strikers, but it refrained from doing so and thereby permitted such payments to be paid. A. Thieblot and R. Cowin, *supra,* at 36-43.

During the course of subsequent amendments to the federal labor laws, the subject of the payment of public funds to strikers appears to have been raised only once. In the original House version of what became the Labor Management Relations Act of 1947, there was a provision which would have deprived strikers of the right to collect unemployment compensation but would have left their right to collect welfare benefits unaffected. 1 N.L.R.B., *Legislative History of the Labor Management Relations Act,* 1947, at 303-304 (1948). However, this provision was eliminated from the final bill, thus indicating an absence of congressional sentiment that the implementation of national labor policy required such a measure.

The AFDC provisions of the Social Security Act were amended numerous times after 1935. 53 Stat. 1379 (1939); 64 Stat. 549 (1950); 70 Stat. 848 (1956); 72 Stat. 1048 (1958); 75 Stat. 75 (1961); 76 Stat. 185 (1962); 79 Stat. 414 (1965); 81 Stat. 877 (1968); 85 Stat. 802 (1971); 86 Stat. 1485 (1972); see generally, Bureau of Social Science Research, Inc., *supra,* at 89-267. Several of these amendments would have provided appropriate occasions for the insertion of a prohibition against the payment of welfare benefits to strikers if Congress had been so minded. In 1950, the benefits of the AFDC program, previously limited to needy, dependent children, were extended to the relatives caring for such children, thus making such benefits available to adults for the first time. Congress could have then enacted a prohibition against the payment of benefits to strikers but, consistent with its basic humanitarian objective to provide minimal support not just for dependent children but also their caretaker relatives (see Bureau of Social Science Research,

Inc., *supra,* at 159-160), the amendment was silent on the subject. In 1961, the AFDC program, which previously had required as a condition of eligibility that one parent be dead, disabled or absent from the home, was extended to two-parent families in which the father was unemployed. See Bureau of Social Science Research, Inc., *supra,* at 198-204. This would have been an obvious occasion for Congress to address the subject of welfare benefit strikers, since the 1961 amendment made federal categorical assistance benefits potentially available to a large number of labor organization members who theretofore would not have met the conditions for eligibility. But again, the amendment was silent on the subject. Finally, in 1967 Congress enacted a detailed set of amendments which require AFDC recipients to participate in work training programs and to seek employment. See generally, *New York State Department of Social Services* v. *Dublino,* 93 S. Ct. 2507 (1973). Although this amendment added a provision requiring the states to disregard the needs of specified recipients who refuse without cause to accept employment, no similar exclusion was provided with respect to strikers. In short, despite continuous congressional reconsideration of the conditions for AFDC eligibility, no attempt was made prior to 1972 to exclude the families of strikers from the program.

The common understanding which has evolved during the course of the legislative history of the AFDC program, that strikers are eligible for its benefits, is also reflected in recent congressional action to enact a prohibition against the payment of such benefits. In 1972, the Administration introduced welfare reform legislation which, as reported out by the Senate Finance Committee, contained an explicit provision to deny strikers benefits under the AFDC program. S. Rep. No. 92-1230, 92nd Cong., 2d Sess. 108, 472-473 (1972). This proposal was debated

on the Senate floor (118 Cong. Rec. 16815, 17049-17052), but was deleted before the bill was voted upon. *Id.* at 16815.

The fate of this proposal was the same as that of other recent attempts to amend welfare and unemployment compensation provisions to exclude strikers from benefits. An Administration attempt to repeal the striker benefits provisions of the Railroad Employment Insurance Act by the provisions of S. 560, 92nd Cong., 1st Sess. (1971) was defeated, and another provision which would have prevented states from granting unemployment compensation to strikers was deleted by the House Ways and Means Committee. H.R. Rep. No. 91-612, 91st Cong., 1st Sess. 18 (1969). Most significantly, an attempt to exclude strikers from the food stamp program, which is closely interrelated with the AFDC program (see 7 C.F.R. §271.3), was not only defeated, but resulted in the enactment of 7 U.S.C. §2014(c), which expressly provides:

> ". . . Refusal to work at a plant or site subject to a strike or a lockout for the duration of such strike or lockout shall not be deemed to be a refusal to accept employment."

The House Committee on Agriculture explained its reasons for adding this provision as follows:

> "The committee debated at length the question of striker participation in the Food Stamp Program; it rejected a provision which would have automatically made strikers ineligible for food stamps. In lieu of such a provision the committee adopted language which clearly states that no person (neither a striker nor a nonstriker) need accept employment or training at a struck plant or site. The committee does not wish to take sides in labor

> disputes and does not believe this bill is the proper place to solve labor-management problems." H.R. Rep. No. 91-1402, 91st Cong., 2d Sess. 11 (1970).

Thus, the only recently enacted amendment concerning public aid to strikers was premised on the congressional view that government neutrality in labor disputes can only be maintained if strikers are afforded the same opportunity as non-strikers to secure such benefits.

It is in the light of this legislative history that the intent of Congress concerning the payment of welfare benefits to strikers must be determined. Initially, it should be pointed out that, notwithstanding the petitioners' formulation of the question presented, the question of congressional intent here is not a preemption issue. As this Court observed only last term in a case involving the 1967 Work Incentive Program amendments to the Social Security Act,

> "Tnis is not a case involving arguable federal preemption of a wholly independent state program dealing with the same or a similar problem . . . AFDC is a federal statutory program. . . ." *New York State Department of Social Services* v. *Dublino, supra,* 93 S. Ct. at 2512, n. 9.

It is also of vital significance to this case that whether strikers may receive AFDC benefits is a question of basic eligibility to participate in the program, and that Congress itself has dealt comprehensively with the conditions of eligibility under AFDC, rather than leaving this subject to the discretion of the states. 42 U.S.C. §602(a)(10). See *King* v. *Smith, supra; Carleson* v. *Remillard,* 406 U. S. 598 (1972); *Townsend* v. *Swank,* 404 U. S. 282 (1971). The Social Security Act has thus been

the direct vehicle by which the will of Congress has been expressed concerning conditions of eligibility to receive AFDC benefits.

In light of the legislative history outlined above and the present statutory farmework of AFDC, it cannot reasonably be argued that the Court should look to the NLRA for any expression of congressional intent concerning the payment of welfare benefits to strikers. Insofar as this case concerns the payment of benefits to strikers pursuant to the AFDC program, it is manifest that since the pertinent provisions of the Social Security Act deal directly with the conditions of eligibility for public assistance, whereas the NLRA on its face has absolutely nothing to do with public assistance, the Social Security Act should be treated as the governing law. And since the Social Security Act does not prohibit the payment of categorical assistance to strikers, the states may pay such assistance in the administration of the federal welfare programs.

While it may be less obvious, the same is true with respect to state public assistance programs. To hold otherwise, it would be necessary to conclude that while Congress refrained from enacting such a prohibition as a part of the federal categorical assistance programs, there should nevertheless be imputed to Congress an intention to prohibit the payment of state general assistance to strikers. Certainly, the state general assistance programs serve the same basic humanitarian objective of providing minimal subsistance to the needy as do the federal categorical assistance programs. It should also be noted that the federal categorical assistance programs are the dominant public assistance programs in effect in this country today, providing benefits to the largest number of recipients

and for the most part at higher levels than state enacted and funded programs.* Since Congress has not found it appropriate to prohibit the payment of benefits to strikers under the federal programs in order to effectuate the objectives of national labor policy, it simply would not make sense to impute a contrary conclusion to Congress with respect to the essentially auxiliary and supplementary state general assistance programs. As the Court stated in *New York State Department of Social Services* v. *Dublino, supra*:

> "Where coordinate state and federal efforts exist within a complementary administrative framework, *and in the pursuit of common purposes,* the case for federal pre-emption becomes a less persuasive one." 93 S. Ct. at 2517. (Emphasis added).

Furthermore, it is significant that it has been generally assumed that welfare benefits may be paid to strikers. A majority of states currently provide such assistance and many apparently have done so since the early days of the AFDC program. A. Thieblot and R. Cowin, *supra,* at 9-12, 36-38, 143-185; see also *Lascaris* v. *Wyman,* 61 Misc. 2d 202, 305 N.Y. Supp. 212 (1969); *Strat-o-Seal* v. *Scott,* 72 Ill. App. 2d 480, 218 N.E. 2d 227 (1966). New Jersey has had an administrative regulation authorizing the payment of welfare to strikers since 1957 (App. 129-132) and there is no evidence, notwithstanding the previous absence of a formal regulation, that strikers have ever been denied welfare benefits in New Jersey. Finally, the United States Department of Health, Education and Wel-

---

* There are a total of 13,985,900 recipients of aid under the federal categorical assistance programs out of a total of 14,732,000 in all federal and state aid programs. Of the total of $11,244,234,000 spent on welfare, $10,517,294,000 is paid through the Federal categorical assistance programs. Dept. of Health, Education and Welfare, Publication No. 74-03100, National Center for Social Statistics Rept. A-2 7/73), Public Assistance Statistics, Tables 1 and 2.

fare has repeatedly approved the "state plans" of states such as New Jersey which permit the payment of AFDC benefits to strikers. The Department's approval of the payment of such benefits was formally expressed recently by the adoption of a regulation (App. 123-125).* It is of course well established that such a long-standing interpretation of the law by the agencies responsible for its enforcement will be given weight by the courts. (*Rosado* v. *Wyman, supra,* 397 U.S. at 415).

The approach to interpretation of congressional intent appropriate in this case is similar to the one followed in *DeVeau* v. *Braisted,* 363 U.S. 144 (1960). In that case, a section of the New York Waterfront Commission Act prohibiting convicted felons from soliciting contributions from union members was challenged as being in conflict with and therefore pre-empted by the provisions of the NLRA which guarantee workers the right to bargain collectively through "representatives of their own choosing". In rejecting this challenge, the Court placed particular emphasis upon the fact that part of the Act had been enacted as a constitutional compact between the States of New York and New Jersey, and had then been approved by Congress. Although the section of the Act which prohibited felons from collecting money from union members was not part of the compact, it did include a provision for the licensing of workers on the waterfront which barred convicted felons from receiving licenses except with the special permission of the bi-state Waterfront Commission. The compact and report submitted with it to Congress also showed

---

* The State does not take any position herein concerning the validity of the regulation insofar as it permits a state to deny AFDC benefits to strikers. See *Francis* v. *Davidson,* 340 F. Supp. 351 (D. Md. 1972) *aff'd* 409 U.S. 904 (1972). The only relevant point with regard to this case is that the regulation permits such payments if the State chooses to make them.

that one of the primary reasons for the enactment of the compact and supplementary waterfront legislation had been the infiltration of criminal elements into waterfront labor organizations. Since Congress had these objectives before it for consideration, the Court found that it had given indirect approval to the state prohibition against felons collecting money from union members, which made it unnecessary for the Court to ". . . imaginatively summon the likely reaction of Congress to the state legislation, as a basis for ascertaining whether due regard for congressional purpose bars the state regulation." 363 U.S. at 153.

The arguments for finding an intent in the NLRA to prohibit the payment of welfare benefits to strikers and their families are even weaker than the preemption arguments rejected in *DeVeau* v. *Braisted*. This case involves not simply state legislation to which Congress has given an indirect imprimatur by approval of a bi-state compact, but rather, at least in part, legislation regarding a major federal program—AFDC—which has been the subject of constant congressional attention in passing upon very substantial annual appropriations as well as numerous amendments to the governing law. In addition, whereas the preemption argument in *DeVeau* v. *Braisted* was constructed around express provisions of the NLRA guaranteeing the right of workers "to bargain collectively through representatives of their own choosing" and the even more express provisions of the Labor-Management Reporting and Disclosure Act of 1959 relating to the disqualification of labor officials from holding union offices, the employer in this case relies solely upon a vague principle of "governmental neutrality in collective bargaining" which it contends is implicit in the NLRA. This is particularly significant in vew of the fact that the Court's decisions relied upon by Super Tire have been grounded

upon express provisions of the NLRA. See e.g., *Nash* v. *Florida Industrial Commission*, 389 U. S. 235 (1967); *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959); *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468 (1955). Therefore, it is even clearer here than in *DeVeau* v. *Braisted* that the establishment of a congressional prohibition against the payment of welfare benefits to strikers should not be indirectly inferred from the provisions of the NLRA. Instead, in view of the fundamental issues of national labor and welfare policy which would be implicated, it should be assumed that Congress would enact such a provision in direct and unambiguous language if it were felt to be necessary in the implementation of national labor policy. *Cf. New York Department of Social Services* v. *Dublino, supra.*

Furthermore, the Court has already held, albeit by a summary affirmance, that the NLRA was not intended to affect state legislation dealing with the payment of welfare benefits to strikers. In *Francis* v. *Davidson*, 340 F. Supp. 351 (D. Md. 1972) (three-judge court) *aff'd* 409 U. S. 904 (1972), a number of strikers brought suit claiming that they had been improperly denied benefits under the unemployed father segment of the AFDC program. In opposing this claim, it was argued that the denial of benefits was valid because the payment of such benefits to strikers would violate statutes enacted by Congress in the field of labor relations. The District Court flatly rejected the argument, stating:

> "Congress [has not], by the enactment of labor laws having national scope, in any way, by the terms of those statutes or otherwise indicated that those laws or the policies underlying them are intended to control the resolution of those opposing viewpoints of social welfare which underlie the

> differences between the Maryland and the contrary rules relating to the grant or denial of AFDC-E benefits to those out of work because of involvement in labor disputes." 340 F. Supp. at 363-364.

Since this same contention was presumably made in the Jurisdictional Statement filed in the appeal, the Court by its summary affirmance in *Francis* v. *Davidson* has already rejected the argument that federal labor law prohibits the payment of welfare benefits to strikers.

Since it is the Social Security Act and not the NLRA to which the Court must look to ascertain the intent of Congress concerning the payment of welfare benefits to strikers, it is unnecessary for a court, as directed in *ITT Lamp Division of Int. Telephone & T. Co.* v. *Minter*, 435 F. 2d 989, 993 (1st Cir. 1970) *cert. den.* 402 U. S. 933 (1971) (see also *Grinnell Corp.* v. *Hackett*, 475 F. 2d 449 (1st Cir. 1973) *cert. den.* 94 S. Ct. 164 (1973)), "to weigh the impact on the state of declaring needy strikers and their families ineligible for welfare against the extent to which making them eligible stripped state government of its neutrality in a labor-management dispute." The hearing and weighing of such evidence would place a court in the position not of implementing the purpose of Congress as expressed in the federal labor laws, but rather of enacting legislation indirectly touching upon the NLRA and directly affecting the categorical assistance provisions of the Social Security Act.* It is axiomatic

---

* The essentially legislative nature of this issue is well indicated by the data which the Court of Appeals in *Minter* said should be considered before a court could rule on the issue:

(Footnote continued on following page)

that such "judicial legislating" is beyond the province of the courts. *Railroad Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U. S. 330, 342 (1960).

The conclusion that the NLRA was not intended to have any effect upon either federal or state welfare programs draws further support from the elusiveness of the principle of neutrality which the petitioners claim the

---

(Footnote continued from preceding page)

> "Under such an approach, a court would be interested in how many states permit strikers to receive welfare; whether or not strikes tend to be of longer duration where welfare is received, any studies or expert testimony evaluating the impact of eligibility for benefits on the strikers' resolve; a comparison between strike benefits and welfare benefits; the impact of the requirement that welfare recipients accept suitable employment; how many strikers actually do receive welfare benefits; and a host of other factors. In addition, the state's legitimate interests must also be considered: its interests in minimizing hardship to families of strikers who have no other resources than the weekly pay check, its concern in avoiding conditions that could lead to violence, its interest in forestalling economic stagnation in local communities, etc." 435 F. 2d at 993.

The Court of Appeals in *Minter* seemed to recognize that Congress should be the forum to resolve these conflicting considerations:

> "This very catalogue of data relevant to a macrocosmic weighing, which a court, if called upon would have to undertake, indicates the preferable forum to be the Congress. Congress would be particularly appropriate in resolving this issue." 435 F. 2d at 993-994.

However, its opinion inexplicably fails to pursue the logic of these remarks, which point to the conclusion that the requisite showing of *a congressional intention* to prohibit the payment of welfare to strikers simply cannot be found. See also *Grinnell Corp.* v. *Hackett*, *supra*.

NLRA embodies. We live in an era in which the influence of government is pervasive. Consequently, it would be neither reasonable nor practical to view the participants in a labor dispute as though they were operating in a laboratory environment beyond the reach of governmental aid or regulation. Would the petitioners urge that an employer whose workers are on strike should be denied an advance on a government contract, a government guarantee on an emergency loan to maintain solvency during a strike, or the right to take a tax write-off for strike-related losses? Would the petitioners urge that strikers who live in public housing must be evicted, that their children should be denied government financial assistance to attend school, or that government may not delay a foreclosure action on the home of a striker who cannot pay his taxes? Thus, it is clear that criteria for the maintenance of "government neutrality" would be difficult to establish.

Indeed, it can be persuasively argued in the present context that the denial of welfare benefits to strikers would destroy rather than maintain equality of bargaining position between employer and employee, thereby placing the government on the side of the employer and penalizing the employees for striking. See Comment, *Welfare Assistance to Strikers in Need: The Protestant Ethic Revisited,* 67 Nw. U. L. Rev. 245 (1972). It should be noted in this connection that New Jersey does not automatically make welfare benefits available to strikers. The State simply takes the position that this circumstance should not disqualify an applicant from receiving benefits. The critical sections of the governing regulation provide:

> "4. No individual shall be presumed to be unwilling to work, or to be wrongfully refusing to accept

suitable employment, merely because he is participating in a lawful labor dispute.

5. An individual who is participating in a lawful labor dispute, and who is needy, has the same right to apply for public assistance, for himself and his dependents, as any other individual who is needy.

6. In the case of an applicant for public assistance who is participating in a lawful labor dispute, there shall be an investigation of need and other conditions of eligibility, and an evaluation of income and resources, in the same way and to the same extent as in all other cases. In such instances, 'strike benefits' or other payments available to the individual from the labor union or other source, shall be considered a resource and shall be determined and accounted for." (App. 131).

If the NLRA contained the neutrality principle for which the petitioners contend, it would be strongly arguable that the position most consistent with that principle would be that already taken by New Jersey, that the fact an applicant for assistance happens to be on strike is irrelevant in determining his eligibility for public assistance.

The insubstantiality of the argument that Congress intended by enacting the NLRA to prohibit the payment of welfare benefits to strikers is further indicated by the absence of any clear statement of the scope of the alleged disqualification. Would the principle of neutrality require the denial of welfare benefits to a worker who has been subject to a lockout? It would hardly be fair to exclude a worker from benefits to which he is otherwise entitled solely because of such unilateral action by an employer, but a worker who has been locked out is as much a party to a labor dispute as a striker and the

abstract logic of the alleged neutrality principle thus might require that he too be denied benefits. Would acceptance of the petitioners' contentions mean that workers who were receiving welfare benefits before going on strike would be disqualified from receiving any benefits at all while on strike?* It would certainly be difficult to view such a disqualification as anything other than a penalty for striking. Does the neutrality principle espoused by the petitioner require that the entire family of a striker must be barred from receiving welfare benefits or only the striker himself? If the entire family were barred, the disqualification imposed on a striker's family would be more severe than that suffered by a family in which a recipient simply refuses without good cause to accept employment, since in the latter instance the family may continue to receive benefits provided the needs of the recipient who has refused employment are not taken into account. 42 U.S.C. §602 (a) (19). As previously suggested, to place the families of strikers in a worse position than the families of the indolent would appear to impose a penalty for striking.

This is not to say that Congress may never choose to enact a sweeping disqualification of strikers and their families from the receipt of welfare benefits, to effectuate what it may perceive in the future to be the needs

---

* Is is not uncommon for members of labor organizations who are not on strike to receive welfare benefits, since with the exception of the unemployed father segment of AFDC, the federal categorical assistance programs do not require a recipient to be unemployed and the high standard of need in many states, coupled with the income disregard provisions of 42 U.S.C. §602(a) (8), permit some workers, particularly ones with large families, to receive not just wages but also welfare benefits. See *X* v. *McCorkle*, 333 F. Supp. 1109 (D. N. J. 1970) modified *sub. nom*, *Engelman* v. *Amos*, 404 U.S. 23 (1971).

of national labor policy. However, the delicate policy questions raised by the petitioners' argument merely underscore the fact that if Congress had intended to prohibit strikers from receiving welfare benefits, it would have specifically included such a prohibition in the Social Security Act. Therefore, the Court should find that the absence of any prohibition in the Social Security Act against the payment of welfare to strikers leaves the states free to pay such benefits.

CONCLUSION

It is respectfully submitted for the foregoing reasons that if the Court reverses the judgment of the Court of Appeals ordering dismissal of the case as moot, it should affirm the action of the District Court dismissing the complaint for failure to state a cause of action.

Respectfully submitted,

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,
Attorney for Respondents, Lloyd W. McCorkle, Commissioner of Institutions and Agencies, and Irving J. Engelman, Director, Division of Public Welfare,
State House Annex,
Trenton, New Jersey 08625.

STEPHEN SKILLMAN,
First Assistant Attorney General,
Of Counsel and on the Brief.

JANE SOMMER,
PAUL N. WATTER,
Deputy Attorneys General,
On the Brief.

LIBRARY
SUPREME COURT, U. S.

FILED
DEC 26 1973
MICHAEL RODAK, JR. CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ

Petitioners

vs.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION NO. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Respondents

BRIEF FOR RESPONDENT, TEAMSTERS LOCAL UNION NO. 676

Robert F. O'Brien
TOMAR, PARKS, SELIGER, SIMONOFF & ADOURIAN
Counsel for Respondent Teamsters Local Union No. 676
400 Market Street
Camden, New Jersey 08102
(609) 964-7768

TABLE OF CONTENTS

	Page
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statement of the Case	3
Summary of Argument	5
Argument	7
I. The Current Contours of the Mootness Doctrine	7
II. The Court of Appeal's Dismissal of the Instant Case as Moot Was Proper	11
A. Under *Oil Workers v. Missouri*, the Instant Case Is Moot Because the Underlying Labor Dispute, and Alleged Concomitant Payment of Welfare Benefits to the Striking Employees, Terminated Prior to the District Court's Dismissal of the Complaint	11
B. The Requisite Probability that the Underlying Labor Dispute, and the Alleged Concomitant Payment of Welfare Benefits, Will Recur is not Present in this Case	14

C. The Mere Availability of Welfare Benefits Does Not Establish Either Continuing Present Effect, or Probability of Future Effect upon the Interests of Super Tire 16

D. The Instant Case Does Not Fall Within Any Rationale of the Case of *Southern Pacific Terminal Co. v. I. C. C.*, 219 U. S. 498 (1911) . . . 18

Conclusion 21

TABLE OF AUTHORITIES CITED

Cases

Aetna Life Insurance Co. v. Haworth, 300 U. S. 227 (1937) 7,8

Carroll v. President & Commissioners of Princess Anne County, 394 U. S. 175 (1968) 9

Commercial Cable Co. v. Burleson, 250 U. S. 360 (1919) 8

Division 1287, Bus Employees v. Missouri, 374 U. S. 74 (1963) 12

Ex Parte Baez, 177 U. S. 378 (1900) 7

Ford Motor Co. v. United States, 335 U. S. 303 (1948) 9

Gray v. Sanders, 372 U. S. 368 (1963) . 8,9,10,14

Harris v. Battle, 348 U. S. 803 (1954) 13

I. T. T. Lamp Division v. Minter, 435 F. 2d 989 (1st Cir. 1970), *cert. den.* 402 U. S. 933 (1971), *reh. den.* 404 U. S. 874 (1971) 4,19

Liner v. Jafco, 375 U. S. 301 (1964).....7,19

Local No. 8-6, Oil, Chemical and Atomic Workers, Int'l Union, AFL-CIO v. Missouri, 361 U. S. 363 (1960) 5,8

Muskrat v. United States, 219 U. S. 346 (1911) 7

North Carolina v. Rice, 404 U. S. 244 (1971) 7

Sibron v. New York, 392 U. S. 40 (1968) ... 9

Southern Pacific Terminal Co. v. I. C. C. 219 U. S. 498 (1911) 5,9,18

United States v. W. T. Grant Co. 345 U. S. 629 (1953) 8

Statutes

National Labor Relations Act, as amended 29 U. S. C. § 151 *et.seq.* § § 151, 158 3

Miscellaneous

Note, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672 8,9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ

Petitioners

vs.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION NO. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Respondents

BRIEF FOR RESPONDENT, TEAMSTERS LOCAL UNION NO. 676

JURISDICTION

Jurisdiction was invoked by the Petitioner under 28 U. S. C. §1254(1). The final judgment of the United States Court of Appeals for the Third Circuit was entered on November 22, 1972. Petitioner's timely request for rehearing was denied by the Court of Appeals on December 20, 1972. Petitioner petitioned the United States Supreme Court for a writ of certiorari on May 19, 1973, and the Court granted the petition on October 9, 1973.

QUESTION PRESENTED

Whether the petitioner's claim that state welfare assistance to strikers violates the Constitution and laws of the United States is rendered moot by the end of the strike at petitioner's plant and the concomitant cessation of welfare payments to the strikers, prior to the district court's hearing of petitioner's original complaint?

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, Clause 1 (App., p. 109)

STATEMENT OF THE CASE

On May 14, 1971, the employees of the petitioner, hereinafter referred to as "Super Tire," who are represented by the Respondent, Teamsters Local Union No. 676, hereinafter referred to as "Local 676," began an economic strike in support of their demands for a new collective bargaining agreement to replace the contract that had expired on May 14, 1971. Four weeks later, on June 10, 1971, Super Tire brought suit against certain officials of the State of New Jersey and of Camden County[1/] in United States District Court for the District Court of New Jersey, alleging that numerous striking Super Tire employees were receiving welfare benefits from the State. (App., pp. 12-24). Super Tire complained that the State's action amounted to a subsidy of the striking employees, which thwarted the national policy fostering free collective bargaining expressed in the National Labor Relations Act, [2/] and contravened the Supremacy Clause of the Constitution. Super Tire sought injunctive relief against further welfare payments to its striking employees and a declaratory judgment stating that the New Jersey regulation permitting the payment of the welfare benefits to the striking Super Tire employees was a violation of national labor policy and the Supremacy Clause of the United States Constitution.

The economic strike by Super Tire's employees continued through June 23, 1971, when the employees ratified a new contract proposal negotiated by Super Tire and Local 676. (App., p. 39). The employees were scheduled to return to work during the remaining part of the

---

1/ Local 676 was permitted to intervene as a party defendant by the district court.

2/ National Labor Relations Act, as amended, 29 U. S. C. §151 *et seq.*; §§151, 158 (App., pp. 109-112).

week, and completely normal operations were resumed by Monday, June 28, 1971. The alleged payment of welfare benefits to those striking employees who had claimed the benefits ceased with the ratification of the new contract.

On Thursday, June 24, 1971, Super Tire's complaint and request for injunctive relief were heard by the district court, Judge John J. Kitchen presiding. After hearing the arguments of counsel, the district court concluded that Super Tire had failed to state a claim upon which relief may be granted, and granted Local 676's motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court viewed the decision in *I. T. T. Lamp Division v. Minter*, 435 F. 2d 989 (1st Cir., 1970), *cert. denied* 402 U. S. 933 (1971), *reh. denied* 404 U. S. 874 (1971) as "... controlling because I feel that any action in this matter such as those enumerated in the case and in which they said, they are going to be recovering, I feel, that such rulings or such testimony should be heard by Congress for whatever action they deem appropriate." (App., p. 45). As a result of this decision, the district court did not hear testimony or review other evidence. The court did not reach the question of constitutionality of welfare eligibility for striking employees, or the issue of mootness raised by Local 676.

Super Tire appealed the district court's decision to the United States Court of Appeals for the Third Circuit, which heard argument by counsel on September 14, 1972. In an opinion filed November 22, 1973, the Court of Appeals, Gibbons C.J., dissenting, dismissed the appeal as moot, and remanded the case to the district court with instructions to vacate its order and dismiss the complaint as moot. (App., pp. 48-72, 73-4). Based on the fact that "...the labor dispute [between Super Tire and its employees] undergirding this challenge to the New Jersey programs had been concluded before the trial

judge dismissed the action and long before appeals were filed or argued in this Court," (App., pp. 49-50), the court concluded that the Supreme Court's decision in *Local No. 8-6, Oil, Chemical and Atomic Workers, Int'l Union, AFL-CIO v. Missouri*, 361 U. S. 363 (1960) "...requires that we dismiss this appeal." (App., p. 65). The Court noted that the task of the federal judiciary "...does not involve conjuring up situations to preserve an otherwise quiescent issue, nor does our assignment include constitutional adjudication unless such is necessarily implicated in the decision of a case or controversy squarely before the Court." (App., p. 65). The court found that Super Tire's reliance on the doctrine of *Southern Pacific Terminal Co. v. I. C. C.*, 219 U. S. 498 (1911) and on the claim that the mere availability of welfare payments to potential striking employees had a continuing direct effect on the collective bargaining relationship, did not save the appeal from "[t]he lack of immediacy and solidity of interest necessary to support jurisdiction..." (App., p. 65). Judge Gibbons argued in dissent that the public interest in the case, and the likelihood that the issues presented would recur, required a decision on the merits. Super Tire's request for a rehearing was denied by the Court on December 20, 1972. (App., p. 108).

SUMMARY OF ARGUMENT

The application of the mootness doctrine by the federal courts is based upon a set of flexible standards. In cases such as the one before the Court where the challenged activity is that of the government and where the activity has ceased prior to any court hearing, and thus terminated any present effect upon the complaining litigant, the federal courts examine the probability that the challenged activity will recur, and the probability that such a recurrence will affect the same complaining litigant's

interests to determine whether the case has become moot.

It is undisputed that the underlying labor dispute, and the alleged concomitant payment of welfare benefits ceased prior to the district court's dismissal of Super Tire's complaint. Under *Oil Workers v. Missouri*, the instant case is moot, unless Super Tire can demonstrate that the challenged activity will probably recur and that its interests will probably be affected by such recurrence. The instant facts do not indicate that (1) a strike will probably occur in the future; (2) potential Super Tire strikers will probably be eligible for, and receive payments of, welfare benefits; and (3) assuming that welfare benefits are available, that the mere availability has any substantial present or future effect upon Super Tire's interests. There is not case or controversy present before this Court, and therefore the Court of Appeals properly dismissed this litigation for mootness.

ARGUMENT

I. THE CURRENT CONTOURS OF THE MOOTNESS DOCTRINE.

The federal courts have traditionally refused to entertain cases which lacked "... subject matter on which the judgment of the court can operate," *Ex Parte Baez*, 177 U. S. 378, 390 (1900), or requested the court to issue an advisory opinion. *Muskrat v. United States*, 219 U. S. 346, 351-353 (1911). The mootness doctrine, as expressed in these decisions, was applied to cases in which the judgment sought from the court could not be carried into effect, and cases in which the relief sought was impossible to grant. Since the advent of the declaratory judgment as a recognized remedy, the mootness doctrine has assumed the role of a jurisdictional barrier under Article III of the Constitution. See *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 241 (1937). As the Supreme Court explained in *North Carolina v. Rice*, 404 U. S. 244, 246 (1971),

> [m]ootness is a jurisdictional question because the Court "is not empowered to decide moot questions or abstract prepositions". *United States v. Alaska S. S. Co.*, 253 U. S. 113, 116 (1920), quoting *California v. San Pablo & Tulare R. Co.*, 149 U. S. 308, 314 (1893); our impotence "to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner v. Jafco, Inc.*, 375 U. S. 301, 306 n. 3 (1964). See also *Powell v. McCormack*, 395 U. S. 486, 497 n. 7 (1969).

The intent of this Article III jurisdictional barrier seems basically similar to the goal of "judicial economy" attributed to the historical use of the mootness doctrine by the federal courts. The objective is to insure that

only a law suit which is ". . . definite and concrete, touching the legal relations of the parties having adverse legal interests . . . [and] a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts", can be considered and decided by a federal court. *Aetna Life Ins. Co. v. Haworth, supra.*

The mootness jurisdictional barrier has been invoked by the federal courts in a variety of factual situations. 3/ In circumstances such as those presently before the Court, where the challenged activity or inactivity is that of the government, and where the immediate dispute has ended because the activity in question has ceased, and thus ended any present effect on the objecting party, the application of the mootness doctrine is not based upon the "mere possibility" standard declared in *United States v. W.T. Grant Co.*, 345 U. S. 629, 633 (1953). See *Commercial Cable Co. v. Burleson*, 250 U. S. 360 (1919); *Local No. 8-6, Oil, Chemical and Atomic Workers, Int'l Union, AFL-CIO v. Missouri*, 361 U. S. 363, 368-369 (1960). 4/ Rather, the federal courts examine the facts of each case to determine whether it is probable that the challenged governmental activity will recur, and also probable that the recurrence will affect the same challenging parties. If there is only a mere possibility of recurrence of the activity, then the impact upon the objecting litigant must be certain and substantial. See *Gray v. Sanders*, 372 U. S. 368 (1963). These two probabilities are applied by the

3/ See generally the majority opinion below, App. pp. 50-60, 469 F. 2d 911, 914-919; Note, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. at 1678-1685.

4/ The Oil Workers v. Missouri case will hereinafter be referred to as *"Oil Workers"*.

courts to insure that a private litigant has a sufficient personal stake in the suit when he challenges governmental actions.[5/]

An alternate standard for finding a sufficient personal stake in a private litigant challenging governmental action was employed by the Supreme Court in *Southern Pacific Terminal Co. v. I. C. C.* 219 U. S. 498 (1911). The often quoted phrase "capable of repetition, yet ending review", refers to the Court's conclusion that the legality of the I. C. C.'s order was the proper subject for the court, despite the fact that the order had expired before the case reached the Court.[6/] While the *Southern Pacific* "standard" has never been used in lieu of the two-probability standard of *Gray v. Sanders, supra.*,[7/] the requirement for certainty of effect upon recurrence of the activity has very occasionally been relaxed. For example, in *Sibron v. New York*, 392 U. S. 40 (1968), the court cited *Southern Pacific* in holding that the fact that the Petitioner had served his six-month sentence prior to the arrival of his appeal before the court did not moot his case. The court reasoned that a dismissal of the case would permit the State to prevent review of many cases by imposing short sentences and denying bail pending appeal. The court noted the injustice inherent in such a result: "a State may not effectively deny a convict access to its appellate courts until he has been released and then argue that his case has been mooted by his failure to do what [the State] alone prevented him from doing". 392 U. S. at 53. The

---

5/ See generally, Note *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. at 1683-85.

6/ 219 U. S. at 515.

7/ See *Carroll v. President & Comm'rs*, 393 U. S. 175 (1968); *Ford Motor Co. v. United States*, 335 U. S. 303 (1948).

court concluded that the importance of maintaining avenues of judicial review for alleged deprivations of constitutional rights free from government created obstructions outweighs any considerations of mootness.

As Circuit Judge Adams noted in the opinion below, " . . . broad statements about mootness suffer the same infirmity as general discussions about most abstruse subjects" (App., p. 51). Whether by choice or by necessity, the Court has avoided a broad mootness "test", and has, instead, developed flexible standards for deciding whether a particular private challenge to governmental action has been mooted by the cessation of the challenged activity. The *Gray v. Sanders, supra*, approach which examines the probabilities of the recurrence of the activity and the impact on the objecting litigant, is used by the court in most recurrence cases. The *Southern Pacific* "capable of repetition, yet evading review" approach is occasionally employed in conjunction with the "two-probability" standard of *Gray* in a special class of recurrence cases in which the complained of governmental activity directly attacks the complaining litigant, the activity has a short duration, and the court fears that a dismissal for mootness might encourage the government to dodge judicial review of the questionable activities by engaging in brief and repeated conduct against the complaining litigant.

II. THE COURT OF APPEAL'S DISMISSAL OF THE INSTANT CASE AS MOOT WAS PROPER.

A. Under Oil Workers v. Missouri, the instant case is moot because the underlying labor dispute and alleged concomitant payment of welfare benefits to the striking employees terminated prior to the district court's dismissal of the complaint.

At the time that Super Tire filed its original complaint, it did not complain primarily of the *existence* of the welfare programs, as it does now before this Court. Paragraphs 6, 7 and 15 of Counts I and II of Super Tire's complaint to the district court clearly refer to the alleged *payment* of welfare benefits by the Respondent State and County officials to the striking Super Tire employees. The thrust of the complaint was at the payment of the benefits to these specific striking employees, and the relief requested was an order haulting those payments.

The alleged payments of welfare benefits to the striking employees ceased before the district court heard argument and made its decision. A new contract had been ratified by the Super Tire employees on June 23, 1971, and the strike had been terminated by the morning of the district court hearing. As Judge Adams noted in the opinion below, " . . . it is clear that the labor dispute undergirding this challenge to the New Jersey programs had been concluded before the trial judge dismissed the action and long before the appeals were filed or argued in this Court." (App., p. 49-50). With the satisfactory resolution of the labor dispute, the alleged payment of the welfare benefits to the strikers ended.[8/] Thus, regardless of the alleged objectionable nature of the payments, all present adverse effect of these

---

8/ This representation was made to the district court by counsel for Local 676 and was not contested by Super Tire (App. pp. 39, 42).

payments upon Super Tire ceased prior to district court's decision because the underlying labor dispute had been settled.

Under *Oil Workers v. Missouri, supra.*, and *Division 1287 Bus Employees v. Missouri*, 374 U. S. 74 (1963)[9], the end of the underlying labor dispute renders the instant case moot. In *Oil Workers*, the complaining union challenged the constitutionality of a Missouri statute[10] empowering the Governor of the state to seize and operate a privately owned public utility that had been struck by its employees, and making strikes against such facilities after the take-over unlawful. The union struck a privately owned natural gas company, the Governor then seized the company, and obtained a injunction against any further work stoppages, according to the statutory scheme. The day after the injunction was issued, the strike ended. Within three months, the underlying labor dispute was settled, and the seizure terminated. The union continued to appeal the issuance of injunction and sought a declaration that the Missouri statute was unconstitutional, because it interfered with the National Labor Relations Act, and violated the Supremacy Clause of the Constitution. The Supreme Court held that the case was rendered moot by the expiration of the injunction and the settlement of the labor dispute.

In *Bus Employees*, the same Missouri statute was challenged, and the underlying labor dispute remained unsettled through the appeal to the Supreme Court. The Court held the case not moot. The Court distinguished

---

9/ *Division 1287, Bus Employees v. Missouri*, will hereinafter be referred to as "Bus Employees".

10/ Chapter 295, Revised Statutes of Missouri, 1949, referred to as the "King-Thompson Act".

Oil Workers and *Harris v. Battle*, 348 U. S. 803 (1954), (a case challenging the constitutionality of a Virginia statute similar to the King-Thompson Act, relied upon by the plaintiff union), stating that "[i]n both of those cases, however, the underlying labor dispute had been settled and new collective bargaining agreements concluded by the time the litigation reached this Court. Here, by contrast, the labor dispute remains unresolved." 374 U. S. at 77-8.

In the instant case, the underlying labor dispute ended prior to the trial court's hearing of the complaint. Thus, under *Oil Workers*, and *Bus Employees*, this case was moot before the district court dismissed the complaint.

Super Tire's effort to distinguish *Oil Workers* on the basis that the complaint there did not ask for declaratory relief, while Super Tire's complaint does ask for a declaratory judgment, collapses in the face the facts of *Oil Workers* as stated by the Supreme Court. While we do not know the exact terms of the Governor's complaint in *Oil Workers* the issue of the constitutionality of the King-Thompson Act was clearly presented to the Missouri trial court in the union's answer, and the trial court declared the entire King-Thompson Act constitutional and valid in an amendment to the injunction decree. See 361 U. S. at 366. In the union's subsequent appeals to higher Missouri state courts, and finally to the United States Supreme Court, a declaration was sought holding the King-Thompson Act unconstitutional. Obviously, the original complaint in *Oil Workers*, did not seek declaratory relief for the simple reason that the Governor could hardly be expected to challenge the constitutionality of the King-Thompson Act, upon which he relied. The distinction that Super Tire pointed out is simply that in *Oil Workers* the issue of the constitutionality of the Missouri statute was raised by the party who was subsequently enjoined, while in the instant case, the issue of the constitutionality of the New Jersey statute was raised

by the party *seeking* the injunction. This distinction hardly renders *Oil Workers* "inapposite". *Oil Workers* is clearly dispositive of the instant case.

B. The requisite probability that the underlying labor dispute, and the alleged concomitant payment of welfare benefits, will recur is not present in this case.

Super Tire attempts to preserve the instant case from a dismissal for mootness with the contention that the factual setting before the Court fulfills the first probability of the two-prong standard used in *Gray v. Sanders*, *supra*; i.e. the probability that the challenged conduct will occur again. Super Tire argues that New Jersey has given no indication that it will change its policy of ". . . subsidiz [ing] striking employees thereby upsetting the federal labor scheme of free collective bargaining." (Petitioner's Brief, p. 11). Super Tire suggests that ". . . since strikes, like pregnancy, 'often comes [sic] more than once'" Petitioner's Brief, p. 13), another strike by its employees is a "substantial" probability, and that New Jersey will amost certainly take the occasion to pay welfare payments to the striking employees. Thus, the end of the 1971 strike by the Super Tire employees does not moot the complaint.

This argument is sheer speculation. While strikes have occurred in the past at the Super Tire plant, they are, like pregnancy, hardly inevitable. Indeed, the federal policy favoring free collective bargaining, which Super Tire so zealously seeks to protect from state erosion, aims at producing labor agreements and preventing strikes. Super Tire urges the Court to ignore the *fact* of collective bargaining between itself and its employees, the good faith efforts of Super Tire and its employees to co-operate in order to settle disputes short of a strike and the administrative machinery of the National Labor

Relations Act, designed to regulate labor relations fairly for both management and labor, and to accept instead a pessimistic prediction that another strike is a "substantial probability". It is simply not possible to predict with any certainty what the labor climate at Super Tire is likely to be in the future. The past occurrence of a strike at Super Tire need not dictate another strike. Super Tire throws up the merest of "possibilities" in its warnings of a future strike, and Local 676 feels that the probability of another strike is "substantial" at this time only if Super Tire is prepared to state that it does not intend to bargain in good faith when the current contract expires. Since Local 676 does not doubt the good faith of Super Tire, it is submitted that Super Tire's rather apocolyptic fears that another strike is a "substantial probability" have no basis in the facts of this case.

Assuming, *arguendo*, that the "mere possibility" of a strike becomes a reality at some future time, it is by no means a foregone conclusion that New Jersey will find the strikers eligible for welfare benefits at that time. The directive under attack by Super Tire is an "interpretive regulation" of the Respondent, State welfare officials (See App., p. 130), and it does not automatically make all strikers eligible for welfare benefits. Rather, the regulation states only that employees on strike may be included among those "persons [who] are willing to work, but are unable to secure employment . . ." (App., p. 15, §10 of Complaint). In other words, the fact that striking employees may not be disqualified because they are on strike does not guarantee that they will meet all *other* eligibility requirements imposed by the State. Thus, it is anything *but* probable that the State will consider Super Tire's employees eligible for welfare benefits, should they go on strike sometime in the future. 11/

11/ Indeed, there is no evidence on the record to show that Super Tire employees actually received benefits during the 1971 strike.

Super Tire has provided no evidence that either another strike will probably occur, or assuming that such a strike does occur, that the striking employees would qualify for benefits.

C. The mere availability of welfare benefits does not establish either continuing present effect, or probability of future effect upon the interests of Super Tire.

Super Tire claims that the instant factual setting also meets the second probability required by the *Gray* standard - the probability that the recurrence of the challenged conduct will adversely affect the complaining litigant. Indeed, Super Tire argues that the "probability" that welfare payments will be made to Super Tire employees when they again decide to strike has a continuing *present* adverse effect upon its interests. Super Tire claims that the mere *availability* of the benefits alters the "continuing" collective bargaining relationship between Super Tire and its employees, and will hamper future contract negotiations with the employees when the current contract, or any future contract expires. Super Tire suggests that the availability of the benefits encourages the employees to adopt inflexible negotiating tactics, both during the negotiation of grievance disputes, and during actual contract negotiations, secure in the knowledge that if they strike, they will receive State welfare benefits. In addition, Super Tire argues that the availability of the benefits will encourage the employees to strike more readily in the future, causing adverse effects upon its interests. Thus, it is the *availability* of the benefits, and not the actual payment of the benefits, from which Super Tire derives the probability of future adverse effect.

As shown previously, it is not at all "probable" that Super Tire's employees will strike their employer again,

or that the welfare benefits will be available to the Super Tire employees, should they again go out on strike. The facts before the Court do not support the contention that the welfare benefits actually continue to be "available" to the Super Tire employees.

In addition, Super Tire's claim that the case is not moot because this alleged availability has a pervasive and continuing effect upon the "on-going" bargaining relationship, falls before the applicable precedent cited by the Court of Appeals: *Oil Workers, supra.* As Judge Adams noted in the opinion below,

> [i]n *Oil Workers* just as in the present case, the threat to strike, labor's principal economic weapon, was affected by a state program. The employees in *Oil Workers*, could have contended that their collective bargaining ability had been hindered by the employer's knowledge that a strike could provoke an injunction terminating the work stoppage, without resolving the dispute. The present case would appear to be the obverse of this. Here, the employers can arguably claim that their collective bargaining ability is hindered by the employees' knowledge that a strike might be made more endurable through receipt of welfare benefits. (App., pp. 62-3).

The Supreme Court rejected the claim that the continuing threat of State seizure in future labor disputes preserved *Oil Workers* from mootness, citing *Harris v. Battle, supra.*

Super Tire's claim that the mere availability of welfare benefits to potential Super Tire strikers is too speculative to adequately fulfill the requirement that the challenged conduct, if repeated, will affect the complaining litigant. This type of assertion was firmly and totally rejected by the Court in *Oil Workers*, and likewise, it should be rejected here.

D. The instant case does not fall within any rationale of the case of Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498 (1911).

Petitioner places particular emphasis upon the so-called "doctrine" articulated in *Southern Pacific Terminal Co. v. I. C. C.*, 219 U. S. 498 (1911). That case concerned a short-term I.C.C. cease and desist order directed against the Appellant. The Court in reviewing the matter placed stress upon the particular direct harm inflicted by the government agency and the very real possibility of further I. C. C. orders against the Appellant. In reviewing the case, the Court noted that such direct I. C. C. orders, although they could be very short, should not be "capable of repetition yet evading review." 219 U. S. at 515. These words, however, were reflective of the particular unique factual situation of the I. C. C. cease and desist orders directed at the Appellant because of its actions. They should not be raised to the level of a litmus paper like test to determine whether, in fact, mootness has occurred. A careful reading of *Southern Pacific, supra.* reveals that Court's affirmation of and emphasis upon traditional mootness concepts. The Court stressed that "[p]rivate parties may settle their controversies at any time and rights which a plaintiff may have had at the time of the commencement of the action may terminate before the judgment is obtained or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action." 219 U. S. at 515, 516. The Court goes on to stress that mootness does in fact occur when "the acts sought to be enjoined had been completely executed, and there was nothing that the judgment of the court, if the suits had been entertained, could have affected." 219 U. S. at 515. In the instant matter before the Court, there is also the same nullity of effect if a Court was to grant the requested relief. If a Court

was to act, it would be acting to enjoin and restrain the public welfare officials when, in fact, they were not and could not grant Super Tire employees any welfare benefit eligibility. This clearly would be the type of "wholly ineffectual" judgment of such "late date" which the Court refused to grant in *Oil Workers*, and which would be wholly inappropriate here.

The "capable of repetition, yet evading review" language was used in *I. T. T. v. Minter*, 435 F. 2d 989 (1st Cir., 1970) yet such language was not used to assert Article III jurisdiction, since a companion case was consolidated with *Minter* wherein the strike was continuing. *Maurice Concrete Products, Inc. v. Minter*, 435 F. 2d 989 (1st Cir., 1970)).

Liner v. Jafco, 375 U. S. 301 (1964) is also cited by Super Tire as supportive of non-mootness. That case, however, is an excellent example of one of the few instances wherein a matter does not become moot because of a strike settlement. That case remained viable because of the determination which had to be made as to whether a bond should have been forfeited because of the wrongful issuance of an injunction restraining picketing. That bond put up by the employer in favor of the striking union remained a very real basis for continuing contention between the parties. No such basis remained in the instant matter when employees stopped the strike and ratified a new collective bargaining agreement. To argue that the dispute continues even after employees are back at work and no longer eligible for any type of benefit ignores the salutary purpose of the National Labor Relations Act which is to promote industrial peace by entrance into collective bargaining agreements.

The decisions of this Court involving mootness insofar as election laws are concerned are particularly supportive of the union's position that because the strike and labor dispute have ended this matter is moot. *Brockington v.*

Rhoades, 396 U. S. 41 (1969), *Hall v. Beals* 396 U. S. (1969). In *Hall* the petitioners were residents of Colorado for only 4-5 months. They attacked a 6-month residency requirement necessary to vote. While in litigation the residency requirement was reduced to 2 months. The case was dismissed by this Court as moot. The Court noted:

> Appellants object now to the 2 months residency requirement as vigorously as they did to the 6-month rule...
>
> But the appellants' opposition to residency requirements in general cannot alter the fact that nothing in the Colorado legislation scheme as now written adversely affects their present interests, or their interest at the time this litigation was commenced. 396 U. S. at 48.

Here, too, in the instant matter, nothing being done now by the State of New Jersey or nothing being done on June 24, 1971 by the State of New Jersey affected Super Tire's interests since the employees are and were no longer eligible for welfare assistance. Indeed the opposition of the petitioner employer has become opposition broadened to welfare eligibility of strikers in general. Just as opposition to residency requirements "in general" was insufficient to stave off mootness in *Hall, supra*, since in fact petitioners were eligible to vote, here too opposition to welfare eligibility for strikers "in general; should be declared by the Court to be insufficient to keep the cause viable under Article III.

In effect, this Court is being asked to apply a rather catchy phaseology lifted from *Southern Pacific, supra*, in substitution for a careful analysis of whether Article III permits it to act. The words of the Court below are particularly apt here. "Because we act only when required can we legitimately act at all." Since the issue presented has become moot, this Court, too, should stay its hand.

CONCLUSION

For all the foregoing reasons, Respondent Local 676 respectfully requests that this Court affirm the Order of the Court of Appeals remanding the case with instructions for the District Court to enter a dismissal for mootness.

Respectfully submitted,

Robert F. O'Brien
TOMAR, PARKS, SELIGER, SIMONOFF & ADOURIAN
Counsel for Respondent Teamsters Local Union No. 676
400 Market Street
Camden, New Jersey 08102

SUPREME COURT, U. S.
No. 72-1554
FILED
DEC 26 1973

Supreme Court of the United States

October Term, 1973

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHARVITE
Petitioners

v.

LLOYD W. MCCORKEL, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STERNE, Director of the Camden County New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION No. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

J. ALBERT WOLL
General Counsel, AFL-CIO
ROBERT C. MAYER
LAURENCE GOLD
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005
THOMAS E. HARRIS
Associate General Counsel,
AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006

INDEX

	Page
Argument	2
Conclusion	13

CITATIONS

Cases:

Boys Markets v. *Clerks Union*, 398 U.S. 235	7
Dandridge v. *Williams*, 397 U.S. 471	7
Davidson v. *Francis*, 409 U.S. 904 Summarily affirming 340 F.Supp. 351 (D. Md.)	3, 4, 5, 6, 7, 8, 9
Florida Avocado Growers v. *Paul*, 373 U.S. 132	3
King v. *Smith*, 392 U.S. 309	4, 9
New York Dept. of Social Services v. *Dublino*, 413 U.S. 405	9, 12
NLRB v. *Gullett Gin Co.*, 340 U.S. 361	10
NLRB v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333	10
Perkins v. *Lukens Steel Co.*, 310 U.S. 113	11
Retail Clerks v. *Schermerhorn*, 375 U.S. 96	6
Udall v. *Tallman*, 380 U.S. 1	10

Statutes:

15 U.S.C. § 1021	11
42 U.S.C. § 607	8, 9, 10

Miscellaneous:

45 C.F.R. § 233.100	5
107 Cong. Rec. 3766	8
38 F.R. 49	5

Supreme Court of the United States

October Term, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; and
A. ROBERT SCHAEVITZ

Petitioners

v.

LLOYD W. MCCORKEL, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant: TEAMSTERS LOCAL UNION No. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the position of the respondents, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 113 national and international labor unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

1. The discussion which follows is directed to demonstrating that should this Court, contrary to the Court of Appeal's conclusion (A. 47-65), rule that this case is not moot,[1] the proper disposition would be to affirm the District Court's dismissal of the complaint as failing to state a valid cause of action. A. 46.[2]

Here, the Super Tire Engineering Company is "challenging the following three programs: Aid for Dependent Children (A.F.D.C.), N.J. S.A. 44:10-1 *et seq.*, a joint state-federal program; Aid to Families of the Working Poor, N.J. S.A. 44:13-1 *et seq.*, a state program; General Public Assistance, N.J. S.A. 44:8-107 *et seq.*, a state program," (A. 48 n. 1), because, during a lawful six week economic strike against the Company (now concluded), "many of the strikers were receiving welfare assistance from the State of New Jersey," (Co. Br. p. 4). The gravamen of the complaint, which was filed against the state officials who administer the programs just noted,[3] is that these

---

[1] Teamsters Local Union No. 676 in its brief to this Court has developed in detail the proposition that this proceeding is moot. We fully agree with the points made therein and to avoid needless repetition adopt them by reference. Naturally, affirmance of the Court of Appeals mootness holding would pretermit consideration of the issue discussed herein.

[2] "A" references are to the printed Appendix filed in this Court. "Co. Br." references are to the brief filed in this Court by the petitioners, Super Tire and A. Robert Schaevitz, the Company's president.

[3] The District Court granted the timely motion of Teamsters Local Union No. 676 to intervene and align itself with the state defendants. A. 1.

"directly interfere with free collective bargaining, a federal policy enunciated in the Labor Acts, 29 U.S.C. §§ 157-8, and are unconstitutional because they contravene the Supremacy Clause of the U.S. Constitution," (A. 48).[4] The predicate of Super Tire's theory is that the "instant case raises a * * * Supremacy Clause question of [great] magnitude: the permissible extent of state power, albeit perhaps directed at non-labor objectives, to alter the collective bargaining process." Co. Br. pp. 20-21.

2. The claim that New Jersey's administration of the first of the three programs challenged—"Aid for Dependant Children (A.F.D.C.), N.J. S.A. 44:10-1 *et seq.*, a joint state-federal program" (A. 48 n.1)—raises a "Supremacy Clause question" is frivolous.

The Supremacy Clause precludes state "impair[ment] of federal superintendence of the field" regulated by federal law. *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 142. In this case the state is administering a joint state-federal program in conformity with federal law as declared in *Davidson* v. *Francis*, 409 U.S. 904 summarily affirming

---

[4] The Court of Appeals went on to note that the Company:

"further assert[s] that the inclusion of striking employees in the programs abridges the federal statute under which one of the programs is funded, and the New Jersey statutes pursuant to which the state officials have promulgated regulations affecting striking employees." A. 48-49.

In this Court the Company does not mention these latter points. See Co. Br. 7-8, 19-27. For this reason and since our response to the contention pressed here makes it plain that these statutory arguments are also without substance we do not treat them separately.

340 F.Supp. 351 (D. Md.). This guarantees the integrity of "federal superintendence of the field."

(a) In *King* v. *Smith*, 392 U.S. 309, 316-317, this Court explained:

> "The AFDC program is based on a scheme of cooperative federalism. It is financed largely by the Federal Government, on a matching fund basis, and is administered by the States. States are not required to participate in the program, but those which desire to take advantage of the substantial federal funds available for distribution to needy children are required to submit an AFDC plan for the approval of the Secretary of Health, Education, and Welfare (HEW). The plan must conform with several requirements of the Social Security Act and with rules and regulations promulgated by HEW." Footnotes and citations omitted.

New Jersey's policy with respect to AFDC payments in a strike context is that: "persons unwilling to work are ineligible for public assistance;" that "when an individual is participating in lawful 'strike,' he may not be considered merely because of such participation, as refusing to work without just cause;" and that an "individual who is participating in a lawful labor dispute, and who is needy, has the same right to apply for public assistance, for himself and his dependents, as any other individual who is needy." A. 129-131.

The square holding of *Davidson* is that in enacting the AFDC program:

> "Congress empowered the Secretary, by regulation, to require each participating state (1) to include or (2) to exclude from its respective AFDC-E program those

out of work because of involvement in labor disputes, or (3) to leave that decision to each state." 340 F.Supp. at 367.[5]

The Secretary's undeviating "policy" has been to follow the third course noted in *Davidson,* viz., "to leave [the] decision * * * [whether] to include or * * * to exclude from its respective AFDC-E programs those out of work because of involvement in labor disputes * * * to each state." See 38 F.R. 49. And the Secretary's present regulations embody this policy in the clearest terms. A. 123-125.[6]

---

[5] In *Davidson* the further requirements which must be respected if the third alternative is followed are stated as follows:

> "In order otherwise to qualify, * * * a father [who is employed less than the number of hours in the month in question specified in 45 CFR § 233.100(a)(1)] must not have available to him from his own resources or other sources including strike benefits assets or income which place him outside of the needy category. Further, he must register for other work and for retraining and accept and participate in both in good faith. Considered in their sum total, the statute and the regulations provide safeguards to ensure that only needy fathers who are willing to be retrained if necessary, and to engage in other employment, can qualify for benefits which are made available primarily to help the children of such fathers." *Id.* at 367-368.

The Company has not argued that New Jersey has failed to abide by these conditions.

[6] 45 CFR § 233.100 as it stood from 1969 until July 12, 1973 (A. 121-123) contained an imperfect expression of the Secretary's policy which *Davidson* read as commiting him to the first alternative noted in the opinion—"requir[ing] each participating state to include * * * those out of work because of involvement in labor disputes." See 340 F.Supp at 366-368.

This is of no aid to the Company here for its position is that there should be a per se exclusion of strikers.

In short, in dealing with the extent to which AFDC payments would be available in the strike context, as in dealing with the extent to which union security agreements would be lawful, Congress "chose to abandon any search for uniformity * * * and decided to suffer a medley of attitudes and philosophies on the subject," (*Retail Clerks* v. *Schermerhorn,* 375 U.S. 96, 104-105). Thus, a state decision to utilize the authority reserved to it by federal law to pay such benefits (so long as the conditions set out in n. 5, p. 5 *supra* are observed), no more raises a Supremacy Clause question than a state decision to adopt a so-called "right-to-work" law (within the confines noted in *Schermerhorn, id.* at 105). In each instance, while it is the state that acts, it is Congress that has set the policy permitting that action. When, as in this case, a challenge is leveled at that policy it raises a question as to the interrelation of federal statutes and not a question of the extent of federal supercession of state law.

(b) As we have seen, the Company argues that AFDC payments in a strike context "directly interfere with free collective bargaining, a federal policy enunciated in the Labor Acts, 29 U.S.C. §§ 157-8" (A. 48). See Co. Br. pp. 7-8, 21-23. We have also seen that the holding in *Davidson* is that Congress, in the Social Security Act, "empowered the Secretary [of HEW] by regulation" to, as he has in fact done, permit the States to make AFDC payments to "those out of work because of involvement in labor disputes," if they so desire, (340 F.Supp. at 367). That holding constituted a considered rejection of the "strenuously urg[d] argument of the "national Chamber of Commerce:"

"that the Congress has clearly indicated, through its

> labor legislation, and in other ways that it did not intend to lend governmental support to those out of work because of labor disputes." *Ibid.*

Thus, the Company's position in this case has already been scrutinized by this Court and found wanting. Therefore, it is only for the sake of completeness that we, at this point, briefly outline the basic flaws in Super Tire's conception of the national labor policy.

When two federal enactments, rather than a federal and a state statute, are alleged to be in conflict, both, since they are equally Congress' product, stand on an equal footing. The national policy of free collective bargaining embodied in the NLRA is, of course, a cornerstone of our system. So too is the national policy of "keeping dependant children within a family," which Congress has been so "desirous" of achieving that it has provided that AFDC payments "could go to children whose need arose merely from their parents' unemployment, under federally determined standards, although the parent was not incapacitated." *Dandridge* v. *Williams,* 397 U.S. 471, 479. It, therefore, becomes "the task of the courts to accommodate, to reconcile the older statutes with the more recent ones." *Boys Markets* v. *Clerks Union,* 398 U.S. 235, 251. In doing so, "the purpose of Congress is the ultimate touchstone." *Schermerhorn,* 375 U.S. at 103.

As *Boys Market* indicates, where Congress has not directly addressed the problem presented, ascertaining its purpose is a complex and delicate undertaking. No such undertaking is required in this instance. Congress has made explicit its purpose to permit AFDC payments in the strike context.

Congressman Mills, the Chairman of the House Ways and Means Committee, and the floor manager of the 1961 amendment to the Social Security Act, 42 U.S.C. § 607, extending AFDC to needy families with dependant children headed by an unemployed parent (in addition to those in which a parent has died or is absent or incapacitated), engaged in the following colloquy with Congressman Dominick of Colorado:

> "*Mr. Dominick:* * * * But it is possible is it not under the laws of some of the states * * * for this money to be used in the case of persons who are unemployed by reason of labor disputes?
>
> *Mr. Mills:* If the states were desirous of using their own funds to take care of a person who may be unemployed as a result of a labor dispute I must admit that the state could get Federal funds under this program to implement that * * *. Whether or not the state would say that the person was in need under the state program as set up under this, I do not know, but the state could do it. It is possible.
>
> *Mr. Dominick:* It is possible that general taxpayers' funds would be funneled into support of children of people who are unemployed by reasons of a labor dispute?
>
> *Mr. Mills:* If the state finds that those children are in need as a result of that, that is true. The primary question is need. That is the first test—are the children in need. The state determines need." 107 Cong. Rec. 3766.[7]

---

[7] A theme in the 1961 legislative history is that AFDC should be limited to the "involuntarily unemployed." See *Davidson*, 340 F.Supp. at 375-377. But as Congressman Mills' remarks demon-

This explanation of the bill's purpose was not challenged. It is, of course, perfectly consistent with the statute's language, and with the overall "scheme of cooperative federalism" embodied in the AFDC program (*King* v. *Smith*, 392 U.S. at 316). Nor, so far as we are aware, was the subject of AFDC payments in the strike context dealt with at any other point in the legislative history. Subsequent to this colloquy this amendment to the Social Security Act was enacted by the House and Senate without change in any respect here relevant and signed by the President.

New York Dept. of Social Services v. *Dublino*, 413 U.S. 405 raised the question of whether Congress intended to allow the states participating in AFDC to adopt their own work incentive programs, an issue closely related to that here. The Court there recognized that, in light of his position, Congressman Mills' *post*-enactment response to inquiries concerning the area of discretion left to the states was "perhaps the most revealing legislative expression" of the Congressional purpose. 413 U.S. at 416-417, n. 19. Certainly then, his explanation of the scope of authority Congress intended to preserve for the states with regard to AFDC payments in the strike context, made prior to the passage of the 1961 amendments, is authoritative.

---

strate, Congress was not of the view that those on strike are "voluntarily" unemployed. Moreover, Congress served this concern, not by disqualifying any group as a class, but by precluding the payment of benefits to individuals who "*without good cause* • • • refuse a bona fide offer of employment," (42 U.S.C. §607(b)(1)(B); emphasis added), and by leaving it to the states to determine when a refusal is "without good cause," (see *Davidson*, 340 F.Supp. at 376-377).

Moreover, the "policy" of the Secretary of HEW in administering the law has been in precise conformity with Congressman Mills' directions. See p. 5 *supra*. Compare, e.g., *Udall* v. *Tallman*, 380 U.S. 1, 16-18. And as recognized in *Davidson*, 340 F.Supp. at 367, while Congress modified 42 U.S.C. § 607 in 1967, it did not question this established administrative practice in debate, nor did the legislation enacted call for a change in that practice. Compare, e.g. *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366. Thus, the legislative materials demonstrate that the Social Security Act can only be read as it was in *Davidson*.

This conclusion is entirely consistent with the "federal labor policy" of "free collective bargaining" (Co. Br. p. 8), as Congress has understood that policy. The Company's basic thesis is that the NLRB should be read to mandate an economic struggle hermetically insulated from the impact of Congressional enactments of general application. But it is not even theoretically possible for Congress to exercise its authority to formulate national economic and social policy without enacting legislation affecting "the balance of power between labor and management" (cf. Co. Br. p. 8).

For example, one of management's basic economic weapons is the right to continue business in the face of a strike by utilizing strike replacements. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333. That weapon's utility, especially for a low wage employer, rests on the availability of a pool of the unemployed. Congress, however, has committed itself in the Employment Act of 1946, 15 U.S.C. § 1021, to the establishment of full employment. The degree to which the mandate of the Employment Act is fulfilled has direct and immediate consequences for "the balance of

power between labor and management." Again, Congress has all but plenary power in setting government contracting policy. See e.g. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113. But it has not utilized that authority to refuse to do business with employers who continue their operations during a strike. The impact on labor disputes of its refusal so to do is obvious and often decisive. The number of such examples that could be cited is limitless. For the economy is a seamless web, the basic shape of which in this day and age is pervasively influenced by federal monetary, fiscal, and regulatory policy.

Thus, Super Tire's conception of the national labor policy is one that has no place in the real world. It is, therefore, not surprising that the Company can not point to a single instance in which Congress's actions, or its refusal to act, can be squared with that construct. To the contrary, so far as we are aware, Congress has consistently treated employers and employees engaged in a labor dispute as eligible for the benefits of economic and social legislation of general application for which they are otherwise qualified. The clearest instance of the dominance of this policy, aside from government contracting and AFDC, is the Food Stamp Act, 7 U.S.C. § 2011 *et seq.*, which provides sustaining assistance to needy families. Management has made a determined effort to exclude the families of strikers from this program. Congress has responded by including them because in its view to do otherwise would be "to take sides in labor disputes." H.R. Rep. 1402, 91st Cong., 2d Sess., p. 11. And the view stated in the House Report is the polar opposite of the Company's view of what constitutes government neutrality in a labor dispute.

3. New Jersey's policy for administering AFDC in the strike context is precisely that which the State also follows in the two state statutes also challenged—Aid to Families of the Working Poor, N.J. S.A. 44:13-1 *et seq.* and General Public Assistance, N.J. S.A. 44:8-107 *et seq.* See A. 129-132. Thus what has been shown thus far entails the conclusion that as a matter of principle these state laws are in conformity with federal policy. And, this Court's decisions culminating in *Dublino*, 413 U.S. at 413-422 (citing and describing the prior authority) establish that AFDC is not a program that occupies the field so as to displace "supplementary [State] efforts toward [the] very same end" pursued by federal law (*id.* at 419). This is the case without regard to the level of state benefits. Even under AFDC:

> "each State is free * * * to determine the level of benefits by the amount of funds it devotes to the program.[15]

[15] The rather complicated formula for federal funding is contained in 42 USC § 603. The level of benefits is within the State's discretion, but the Federal Government's contribution is a varying percentage of the total AFDC expenditures within each State. * * * The benefit levels vary greatly from State to State. For example, for May 1967, the average payment to a family under AFDC was about $224 in New Jersey, $221 in New York, $39 in Mississippi, $20 in Puerto Rico, $53 in Alabama."

King v. *Smith*, 392 U.S. at 318-319 & n. 15.

Assuredly then, federal law does not determine the benefits which a State may pay under a parallel program funded entirely by the State.

In short, this aspect of the Company's Supremacy Clause argument, like the rest, is without substance.

CONCLUSION

For the above stated reasons the decision of the Court of Appeals should be affirmed, or in the alternative if this case is not moot, the decision of the District Court dismissing the complaint as failing to state a valid cause of action should be affirmed.

Respectfully submitted,

J. ALBERT WOLL
General Counsel, AFL-CIO
ROBERT C. MAYER
LAURENCE GOLD
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005
THOMAS E. HARRIS
Associate General Counsel,
AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006

December, 1973

IN THE

Supreme Court of the United States

October Term, 1973
No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; and A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGLEMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD, JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; Intervenor Defendant: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

Motion for Leave to File Brief and Brief Amicus Curiae by Southern California District Council of Laborers.

LIONEL RICHMAN, ESQ.,
1336 Wilshire Boulevard,
Los Angeles, Calif. 90017,
(213) 483-7400,

Attorney for Southern California District Council of Laborers.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Statement of the Nature of Applicant's Interest	1
Question of Law Which Has Not Been Presented	2
Memorandum in Support of Motion	3

TABLE OF AUTHORITIES CITED

Cases

General Electric v. Callahan, 29 F.2d 60	4
Mach-tronics, Inc. v. Zirpoli (CA 9) 316 F.2d 820	5
Mastro Plastics v. NLRB, 350 U.S. 270	3
Motor Coach Employees v. Missouri, 374 U.S. 74	3
Quemos Theatre Company, Inc. v. Warner Bros. Pictures, Inc. (DC-NJ) 35 F.Supp. 949	5
San Diego Building Trades Council v. Garmon, 359 U.S. 236	3
Teamsters Local 20 v. Morton, 377 U.S. 252	3

Statutes

California Unemployment Insurance Code, Sec. 1262	2
California Unemployment Insurance Code, Sec. 2677	2
Labor Management Relations Act, Sec. 8(a)	3
United States Code, Title 45, Sec. 354(a-2)(iii)	4

IN THE

Supreme Court of the United States

October Term, 1973
No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; and A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGLEMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD, JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; Intervenor Defendant: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

Motion for Leave to File Brief in Amicus Curiae by Southern California District Council of Laborers.

Statement of the Nature of Applicant's Interest.

Applicant, SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS represents local unions throughout twelve southern counties of California. It instituted a proceeding in the United States District Court for the Central District of California entitled, "Angel J. Castor et al., Plaintiffs, vs. John Calderas,

etc., et al., Defendants.", Case No. 73-1079-IH. That proceeding was dismissed by the court under the doctrine of abstention requiring plaintiffs to first exhaust their remedies under state administrative and judicial procedures. An administrative hearing has already been held and the parties are awaiting a decision.

The issue is the impact of Sections 1262 and 2677 of the Unemployment Insurance Code of the State of California which deny unemployment insurance benefits to an individual if he left his work because of a trade dispute. The trade dispute which led to the litigation involved a strike which led to the filing of unfair labor practice charges and ultimate settlement of the unfair labor practice charges by the signing of a consent settlement involving reinstatement of employees on the part of the employer.

The questions presented to this Honorable Court in the instant case and upon which certiorari has been granted does not distinguish between economic strikes and unfair labor practice strikes and for that reason this moving party fears that this crucial issue may be disregarded if the court's ruling is as broad as the questions which have been presented to it for review.

This issue is particularly relevant since this Honorable Court may very well determine that federal law preemption may be applicable in unfair labor practice strikes and inapplicable in economic strikes.

Question of Law Which Has Not Been Presented.

WOULD DISQUALIFICATION OF STRIKERS FOR UNEMPLOYMENT OR OTHER PUBLIC BENEFITS VIOLATE FEDERAL LABOR POLICY IF THE STRIKERS ARE ENGAGED IN AN UNFAIR LABOR PRACTICE STRIKE?

Memorandum in Support of Motion.

The federal labor policy enunciated in the National Labor Relations Act, and its successor the Labor Management Relations Act of 1947, as amended, preempts the field and bars state regulation of conduct which is arguably protected or proscribed by the Act.

San Diego Building Trades Council v. Garmon, 359 U.S. 236.

It is not necessary that a state statute seek to regulate preempted conduct. It is sufficient for the sake of preemption that the mere implementation of state policy has an impact upon federal labor policy which is more than peripheral.

Teamsters Local 20 v. Morton, 377 U.S. 252;
Motor Coach Employees v. Missouri, 374 U.S. 74.

Both the National Labor Relations Board and the United States Supreme Court have recognized the significant difference between an economic strike and an unfair labor practice strike. The economic strike is part of the negotiating process and is part of the attempt by the employees to achieve greater benefits than an employer is willing to give. On the other hand, an unfair labor practice strike is a strike of the employees in protest against the violation by their employer of the strictures imposed upon him by Section 8(a) of the Labor Management Relations Act. It is a strike in protest against the employer's violation of the law. This strike may even occur in the face of a collective bargaining agreement containing a "no strike" clause since it is independent of economic interests and it is part of the enforcement of the law.

Mastro Plastics v. NLRB, 350 U.S. 270.

Plaintiffs contend that by throwing the weight of the State of California upon the side of the employer charged with a violation of federal law, the state of California is interfering with federal labor policy.

As the First Circuit has heretofore pointed out, the impact of state action may be indirect and peripheral and still interfere with federal labor policy.

The State of Massachusetts has a mediation and conciliation statute which gives to the Governor the power to direct fact finding in a labor dispute which, in the opinion of the Governor, threatens to seriously affect the public welfare. The decision of the fact finding board is not binding upon the parties to the dispute unless they have specifically agreed to be bound. In the absence of such agreement, the board publishes its decision and its functions thereafter are concluded.

In enjoining the appointment of such a fact finding board to investigate a dispute affecting interstate commerce, the court said that the mere publication of the decision ascertaining which party is "mainly responsible or blameworthy" for the existence of the dispute, would constitute conflict between federal and state labor policy and was therefore beyond the jurisdiction of the state.

General Electric v. Callahan, 29 F.2d 60, 67.

Under the Railway Labor Act, an employee is denied unemployment insurance benefits for engaging in a strike *only* if the Board finds that the strike was commenced in violation of the Railway Labor Act or in violation of the established rules and practices of a bona fide labor organization of which the employee is a member. (45 U.S.C. 354(a-2) (iii).)

The status of the unfair labor practice strikers may be compared to the status of civil suiters in antitrust proceedings who are considered, "private attorneys gen-

eral" in aiding and achieving the broad, social objectives of the statute.

Mach-tronics, Inc. v. Zirpoli (CA 9) 316 F.2d 820;

Quemos Theatre Company, Inc. v. Warner Bros. Pictures, Inc. (DC-NJ) 35 F.Supp. 949.

The party, TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD of TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, has consented to the filing of this motion, Petitioners do not consent to the filing of an *amicus curiae* brief and respondent public agencies have consented.

WHEREFORE the moving party respectfully moves that it be permitted to appear in *amicus curiae* in support of respondents.

Respectfully submitted,

LIONEL RICHMAN, ESQ.,
Attorney for Southern California District Council of Laborers.

FILED
JAN 11 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; AND A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD; JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; INTERVENOR DEFENDANT: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

REPLY BRIEF FOR PETITIONERS

HERBERT G. KEENE JR.
JAMES A. YOUNG
1300 Two Girard Plaza
Philadelphia, Pa. 19102

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
111 West Washington Street
Chicago, Illinois 60602

Attorneys for Petitioners

Of Counsel:
STRADLEY, RONON, STEVENS & YOUNG
1300 Two Girard Plaza
Philadelphia, Pa. 19102

LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

INDEX

PAGE

The Mootness Arguments 2

The Substantive Arguments 5

Conclusion 12

AUTHORITIES CITED

Cases

Boys Markets v. Retail Clerks Union, 398 U. S. 235 (1970) 8

Brockington v. Rhodes, 396 U. S. 41 (1969) 3

Carleson v. Remillard, 406 U. S. 598 (1973) 9

Davidson v. Francis, 409 U. S. 904 (1972) 10, 11

Delaware Coach v. Public Service Commission, 265 F. Supp. 648 (Del. 1967) 6

DeVeau v. Braisted, 363 U. S. 144 (1960) 7

Division 1287, Bus Employees v. Missouri, 374 U. S. 74 (1963) 3

Dow Chemical Company v. Taylor, ... F. Supp. ——, 57 F. R. D. 105 (E. D. Mich., *pend.*) 7

Dunn v. Blumstein, 405 U. S. 330 (1972) 4

Fortson v. Toombs, 379 U. S. 621 (1965) 4

Francis v. Chamber of Commerce of the United States, ... F. 2d ..... (4th Cir. June 20, 1973) 11

Gray v. Sanders, 372 U. S. 368 (1963) 3

Grinnell Corporation v. Hackett, 475 F. 2d 449 (1st Cir. 1973) *cert. den.* 94 S. Ct. 164 (1973) 7, 8

Hall v. Beals, 396 U. S. 45 (1969) 3

John Hancock Mutual Life Insurance Company v. Commissioner, 394 Mass. 390, 208 N. E. 2d 516 (1965) .. 6

King v. Smith, 392 U. S. 309 (1968) 10

Local 365, Cemetery Workers v. New York, No. 73-594, 42 U. S. L. W. 3383 (Jan. 8, 1974) 4

Moore v. Ogilvie, 394 U. S. 814 (1969) 3

Nash v. Florida Ind. Com., 389 U. S. 235 (1967) 7

N. L. R. B. v. Erie Resistor Corp., 373 U. S. 221 (1963) 6

N. L. R. B. v. General Electric Co., 418 F. 2d 736 (2nd Cir. 1969) 6

N. L. R. B. v. Granite State Joint Board, 409 U. S. 213, (1972) 9

N. L. R. B. v. Insurance Agents' Union, 361 U. S. 477 (1960) 5

N. L. R. B. v. MacKay Radio & Tel. Co., 304 U. S. 333 (1938) 9

New York State Dept. of Soc. Serv. v. Dublino, ... U. S. ....., 93 S. Ct. 2507 (1973) 9

Oil Workers v. Missouri, 361 U. S. 363 (1960) 3

Perez v. Campbell, 402 U. S. 637 (1971) 6

Powell v. McCormack, 395 U. S. 486 (1969) 3

Retail Clerks v. Schermerhorn, 375 U. S. 96 (1963) ... 8

Sibron v. New York, 392 U. S. 40 (1968) 3

Southern Pacific Terminal Co. v. I. C. C., 219 U. S. 498 (1911) 2

United States v. Concentrated Phosphate Export Assn., 393 U. S. 199 (1968) 3

United States v. W. T. Grant Co., 345 U. S. 629 (1953) 3

Statutes and Congressional Material

Aid for Dependent Children Program, 42 U. S. C. § 601 *et. seq.* 4, 10
Article I, § 10 of the Constitution 7
Federal Unemployment Tax Act, 26 U. S. C. § 3301 7
Food Stamp Act, 7 U. S. C. § 2014(c) 8
Hearings on H. R. 12080 before the Senate Committee on Finance, 90th Cong., 1st Sess., p. 264 10
House Report No. 544, 90th Cong., 1st Sess. (1967) 10
National Labor Relations Act, 29 U. S. C. § 152(3) 10
N. J. S. A. 44:10, *et. seq.* 5
Railroad Employment Insurance Act, 45 U. S. C. § 351.. 8
Report of Senate Committee on Finance of ADC Benefits to Children of Unemployed Parents, 97th Cong., 1st Sess. (1961, Rept. No. 165), p. 3 10

Miscellaneous

1973 Annual Report of the Director, Administration Office of the United States Courts, p. A-7, table B-5 4
Brown, Free Will in the Frontiers of Federalism, 58 Mich. L. Rev. 999 (1960) 7
Carney, The Forgotten Man on the Welfare Roll: A Study of Public Subsidies to Strikers, 1973 Wash. U. L. Q. 469 (1973) 11
Comment, Welfare for Strikers: ITT v. Minter, 39 Chi. L. Rev. 79 (1971) 9, 10
Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672 (1970) 2
Thieblot and Cowin, Welfare and Strikes: The Use of Public Funds to Support Strikers, Industrial Research Unit, University of Pennyslvania Press (1972) 8

U. S. Department of Labor, Bureau of Labor Statistics, Work Stoppages in 1971 (Selected Final Tabulations) (June 1973) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 72-1554

SUPER TIRE ENGINEERING COMPANY;
SUPERCAP CORPORATION; AND
A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD; JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; INTERVENOR DEFENDANT: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

REPLY BRIEF FOR PETITIONERS

The brief of Respondent Teamsters Local Union No. 676, which is limited to the issue of whether the instant controversy is moot, and the briefs of the Respondents New Jersey officials McCorkle and Engleman and *amicus* AFL-CIO, which address only the substantive question of whether strikers may, con-

sistent with federal labor policy, receive state welfare assistance, each advance several erroneous contentions which warrant a response.

THE MOOTNESS ARGUMENTS

The Petitioners' principal brief argued that, notwithstanding that the strikers in the instant case terminated their eligibility for welfare assistance after the decision of the District Court,[1] the constitutional issue as to the propriety of such assistance was not thereby rendered moot. This position was premised, *first*, on the probability of recurrence of both the alleged objectionable state action—the availability and payment of welfare benefits to strikers—and its impact on Petitioners; and, *second*, on the applicability of the "capable of repetition, yet evading review" standard of *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498, 515 (1911), which permits the probability tests to be "relaxed . . . by giving private plaintiffs," such as Petitioners, "sufficient stake to challenge governmental activity that may recur without requiring proof of certainty that they will then be affected . . . " Note, *Mootness On Appeal In The Supreme Court*, 83 Harv. L. Rev. 1672, 1685 (1970).

Local 676 asserts, however, that the mootness doctrine is "based upon flexible standards" which require, in order to meet either the probability or *Southern Pacific* tests, that Petitioners "demonstrate that the challenged activity will *probably* recur and that [their] interests will *probably* be affected." Local 676 brief, pp. 5, 6, 18-19 (emphasis added.) There are several fallacies in this contention. First, the mootness doctrine does not vary from factual situation to factual situation or even from

1. Local 676 argues that the "payment of welfare benefits ceased prior to the district court's dismissal of Super Tire's complaint." Local 676 brief, p. 6. The dismissal of the complaint, however, occurred at the June 24, 1971 hearing (App., p. 45) while the employees cessation of their strike and return to work which, rather than the ratification of a new contract, was the critical event in terminating eligibility for welfare assistance (see, e.g., App., pp. 130-132), admittedly did not take place until June 28, 1971. Local 676 brief, p. 4.

one category of cases to another. Rather than consisting of such a series of internally inconsistent and varied "flexible" standards, it is an evolving concept which, although in a current "state of flux" (Note, 83 Harv. L. Rev. at 1687-88), is based on common policies applicable to all cases and best approached through common criteria by which all controversies may be adjudicated. *Second*, there has never been a requirement that a party challenging governmental action must show that he will "probably" be affected by a recurrence of such conduct. *And finally*, while there may at one time have existed a different probability standard where the government was a defendant rather than a plaintiff, the inherent illogic[3] of this distinction has been evidenced in recent cases involving governmental defendants, such as *Sibron* v. *New York*, 392 U. S. 40, 51-53 (1968), and *Moore* v. *Ogilvie*, 394 U. S. 814 (1969),[4] where the likelihood of recurrent impact of the ob-

2. For example, in *Oil Workers* v. *Missouri*, 361 U. S. 363 (1960), one of the two authorities principally relied on by Local 676, the critical consideration, which Local 676 continues to ignore, is the "speculative" possibility there of a new emergency situation arising in the single industry involved sufficient to cause whomever was then Governor to exercise his discretion and invoke the disputed statute. *Oil Workers*, in this sense, presented a *sui generis* case. See *Division 1287, Bus Employees* v. *Missouri*, 374 U. S. 74, 78 (1963); and Petitioners' principal brief, p. 18. Similarly, in *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953), the mootness progenitor of *Gray* v. *Sanders*, 372 U. S. 368 (1963), the other case principally relied on by Local 676, the "mere possibility of recurrent violation" was held sufficient "to keep the case alive." A respondent, in short, has "the heavy burden of persuasion" of showing that "subsequent events [have] made it absolutely clear that the allegedly unlawful behavior could not reasonably be expected to recur." *United States* v. *Concentrated Phosphate Export Assn.*, 393 U. S. 199, 203 (1968).

3. See the brief *amicus curiae* of The Chamber of Commerce of the United States, pp. 14-22; and Note, 83 Harv. L. Rev. at 1691. In *Gray*, moreover, this Court applied the *Grant* government plaintiff test to a case where the government was the defendant. See also *Powell* v. *McCormack*, 395 U. S. 486, 562, n. 5 (1969) (dissenting opinion of Mr. Justice Stewart).

4. *Moore*, rather than the election cases cited by Local 676 (*Brockington* v. *Rhodes*, 396 U. S. 41 (1969), and *Hall* v. *Beals*,

jectionable conduct on *other* similarly-situated private plaintiffs, instead of the certainty of its recurrence as to the *same* plaintiff, was critical in finding those cases not to be moot. Similarly, the fact that the Petitioners were once directly harmed by the challenged state action, continue to be affected by both the availability of the disputed subsidies and their potential payment to striking employees (see Petitioners' principal brief, pp. 12-15), and represent, along with *amicus* Chamber, numerous other employers who are certain to be affected, insures Petitioners' personal stake in the outcome of this case and the continuing adversary context of the case. These considerations, particularly when viewed in the light of the relative brevity of the overwhelming majority of strikes contrasted with the time necessary to secure an appellate decision on the merits,[5] preclude a finding of mootness. See *Local 365, Cemetery Workers* v. *New York*, No. 73-594, where this Court last week denied certiorari, rather than granting certiorari and vacating the lower court's decision as moot, in a case in which the underlying strike had terminated, as here, prior to the decision below. 42 U. S. L. W. 3383 (Jan. 8, 1974). Local 676, in short, seeks to employ mootness criteria which have never existed and which, at least since *Moore* and *Sibron*, have been expressly repudiated.

---

396 U. S. 45 (1969), where changes in law mooted challenges to no longer extant state policies), is the appropriate analogy to the present case. See also *Dunn* v. *Blumstein*, 405 U. S. 330, 334, n. 2 (1972), and *Fortson* v. *Toombs*, 379 U. S. 621 (1965).

5. The median duration of all work stoppages in the United States for the most recent year in which statistics are available is *eleven days*. U. S. Department of Labor, Bureau of Labor Statistics, Work Stoppages in 1971 (Selected Final Tabulations) (June 1972), p. 3, table 1. By contrast, the median time for a federal civil case from the filing of complaint to a decision by a court of appeals, where the case is briefed and/or orally argued to the appellate court, is *nineteen months*. 1973 Annual Report of the Director, Administration Office of the United States Courts, p. A-7, table B-5.

THE SUBSTANTIVE ARGUMENTS

Neither Respondent state officials nor the AFL-CIO contravert Petitioner's argument that, by making available to strikers substantial state assistance (see Petitioners' brief, p. 23, n. 26) which would not have been provided absent a strike,[6] there is a significant state intrusion upon the federal labor policy of free collective bargaining. Rather, they have argued that Congress intended precisely such state interference or, alternatively, that the failure of Congress to expressly prohibit state subsidies to strikers now bars any Supremacy Clause attack. Both of these contentions lack merit.

1. The State and AFL-CIO primarily direct their briefs at one portion of Petitioners' challenge: the New Jersey Assistance for Dependent Children program, N. J. S. A. 44:10-1 *et seq.*, promulgated under the federal Aid to Families of Dependent Children (A. F. D. C.) program, 42 U. S. C. § 602, *et seq.* The pertinent unemployed parent segment of that program, however, has not been in effect in New Jersey since June 30, 1971 and the present assistance programs, New Jersey's General Public Assistance, N. J. S. A. 44:8-107 *et seq.*, and Assistance

6. Petitioners do not, as the State (brief, pp. 18-22) and AFL-CIO (brief, p. . . . .) contends, seek to insulate labor relations from the "seamless web" of society. There is no claim, for example, that strikers, or their families who are judged by the same eligibility standards (42 U. S. C. § 607; App., pp. 118-120), should be precluded from any assistance which they may have received prior to the strike. Petitioners only argument is that neither management nor labor should receive *new* or *additional* public subsidies solely because they have chosen to resolve their differences by "a brute contest of economic power" (*N. L. R. B.* v. *Insurance Agents' Union*, 361 U. S. 477 (1960)), such as a strike or a lockout. See Petitioners' brief, p. 22, n. 5. Public benefits that would be provided regardless of whether a strike had occurred—e.g., veterans' assistance or public housing to strikers or government contracts or tax advantages to an employer—or private forms of assistance—e.g., a union or potential striker amassing a strike fund, a striker obtaining interim strike employment or an employer subcontracting or utilizing striker replacements—would clearly not constitute impermissible conduct. The state must simply remain neutral and pre-

to Families of the Working Poor, N. J. S. A. 44:13-1, *et seq.*, programs, which Petitioners have also challenged, are totally state funded. See Petitioners' brief, p. 4, n. 1. The present state programs, moreover, contain a substantially different support scheme than A. F. D. C.; these programs cannot simply be viewed as "essentially auxiliary and supplementary" or "parallel" (State brief, pp. 12-13; AFL-CIO brief, p. .....) to the A. F. D. C. program. For example, while A. F. D. C. benefits are not paid for the first thirty days of unemployment (42 U. S. C. § 607(c); App., p. 120), the New Jersey assistance programs contain no such limitation. The strikers in the instant case, from the commencement of the strike on May 14, 1971 through June 10, 1971 when this action was filed, were eligible only for state-funded assistance.[7] This difference, in view of the relative short duration of most strikes (see n. 5, *supra*), is critical. Regardless, therefore, of whether Congress has acted with respect to the question of A. F. D. C. assistance to strikers, an issue to be discussed *infra*, state programs outside its control which intrude upon the federal labor scheme must fall. See *Perez* v. *Campbell*, 402 U. S. 637, 651-652 (1971).

2. The State and AFL-CIO also err in assuming that a

serve, except as expressly sanctioned by Congress, the *status quo ante bellum*. It may not "devastat[e]" either the right to strike (see, e.g., *N. L. R. B.* v. *Erie Resistor Corp.*, 373 U. S. 221, 230-231, 236 (1963)), or, as in this case, grant strikers "a potent weapon" with which to achieve their objectives. *John Hancock Mutual Life Insurance Company* v. *Commissioner*, 394 Mass. 390, 208 N. E. 2nd 516, 524-5 (1965). See also *N. L. R. B.* v. *General Electric Co.*, 418 F. 2d 736, 762 (2nd Cir. 1969) (governmental insulation from economic pressure discourages any " ' serious attempt to resolve differences and reach a common ground' . . . [and encourages instead] 'a pre-determined resolve not to budge from an initial position' . . ."); and *Delaware Coach* v. *Public Service Commission*, 265 F. Supp. 648 (Del. 1967).

7. On June 13, 1971, the thirty day A. F. D. C. waiting period expired and the strikers became qualified for A. F. D. C. benefits which were paid for the period through June 28, 1971 when they returned to work. Two days later, on June 30, 1971, the unemployed parent segment of the A. F. D. C. program expired in New Jersey.

joint state-federal cooperative program, like A. F. D. C., insulates any discretionary state decision thereunder from the ambit of the Supremacy Clause. Such an assumption has been repeatedly rejected, at least where national labor policy is involved, by both this Court and others. See, e.g., *Nash* v. *Florida Ind. Com.*, 389 U. S. 235 (1967);[8] *Grinnell Corporation* v. *Hackett*, 475 F. 2d 449 (1st Cir. 1973), *cert den.* 94 S. Ct. 164 (1973); and *Dow Chemical Company* v. *Taylor*, ... F. Supp. ....., 57 F. R. D. 105 (E. D. Mich., *pend.*). Cooperative programs, after all, are only incentive systems by which Congress encourages those states that wish, through the lure of federal matching funds or tax credits, to act in some sphere of activity. See Brown, *Free Will in the Frontiers of Federalism*, 58 Mich. L. Rec. 999, 1010 (1960). Except for certain minimal requirements that are reviewed and certified to have been satisfied by the Department of Health, Education and Welfare (H. E. W.), the states act on their own in expanding the scope of their A. F. D. C. programs.[9] Such additional coverage is of no interst to the reviewing federal agency; neither its "indirect imprimatur" nor its administrative expertise (State brief, pp. 14, 15) is involved. Clearly, therefore, the choice of whether to provide A. F. D. C. subsidies to strikers is a purely state decision.

3. Congress has admittedly not expressly required that states must render A. F. D. C. assistance to strikers. The "most that

8. In *Nash*, this Court applied the Supremacy Clause to a state unemployment compensation statute which had been approved and certified by the federal government pursuant to another joint state-federal cooperative program, the Federal Unemployment Tax Act, 26 U. S. C. §§ 3301-11.

9. This is a far different procedure from that followed in *DeVeau* v. *Braisted*, 363 U. S. 144 (1960), relied on by the State (brief, pp. 14-16), where a "unique" interstate compact was submitted, pursuant to Art. 1, § 10 of the Constitution, to Congress for its consent and approval. As this Court stated, "[t]his was no perfunctory consent. Congress had independently investigated" the problem during extensive hearings. 363 U. S. at 149. This substantial interrelationship and state-federal interdependence is a stark contrast to the instant situation.

can fairly be said," in this area as in the related area of unemployment compensation payments to strikers, "is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances." *Grinnell Corporation* v. *Hackett*, 475 F. 2d at 457. The problem of public assistance to strikers, moreover, although a minor concern in the past, has only recently evolved into a major national controversy.[10] And in recent years, where Congress has addressed the problem and intended that welfare benefits intrude upon the collective bargaining process, it has clearly spoken; [11] "given the ability of Congress to articulate that intent in other programs, one might also infer that its silence [in the A. F. D. C. area] . . . was indicative of a contrary intent." *Id.* at 457. This conclusion is particularly compelling here since, as described below, the legislative history of the A. F. D. C. program amply demonstrates that "Congress did not anticipate that the A. F. D. C.-U. program would benefit large groups of persons of proven work ability who were tem-

10. See Thieblot and Cowin, *Welfare And Strikes: The Use of Public Funds to Support Strikers*, Industrial Research Unit, University of Pennsylvania Press (1972), p. 1: "Supporting strikers on a widespread basis with public welfare funds is a relatively recent phenomenon. Although instances of public support for strikers are occasionally found as long ago as the New Deal and such funds were used in the steel industry strike in 1959-60, these were isolated instances. It remained for the strikes of the late 1960's and early 1970's to establish the current trend of increasing use of public welfare in strikes." Fragmentary excerpts of inconclusive legislative history, such as the Mills-Dominick colloquy relied on by the AFL-CIO (brief, p. . . . .), or statements made by New Deal Administration officials (State brief, p. 7) prior to the extensive use of public funds for strikers in recent years, were thus "responsive to a situation totally different from that which exists today." *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235, 250 (1970). See also *Grinnell Corporation* v. *Hackett*, 475 F. 2d at 456 (". . . in the absence of any floor amendment or debate . . . and of any real consideration of the issue at any level, we cannot take [the deletion of various proposals] as a clear indication of the intention of the entire Congress . . .").

11. See, e.g., the Food Stamp Act, 7 U. S. C. § 2014(c), and the Railroad Employment Insurance Act, 45 U. S. C. § 351; see also *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96 (1963).

porarily unemployed . . . [and] did not intend to depart from the practice, nearly universal under unemployment compensation programs, of denying aid to strikers . . ." Comment, *Welfare for Strikers: ITT* v. *Minter*, 39 U. Chi. L. Rev. 79, 90-91 (1971). State assistance to strikers, whether under A. F. D. C. or state funded programs, is, moreover, "inconsistent", as described below, with the actual legislative intent. *Id.* at 97-98.[12]

The entire thrust of the unemployed parent segment of the A. F. D. C. program is aimed at those individuals with a recent connection with the work force who, through training, stood the greatest chance of being "drawn into employability."[13] The legislative history of the program manifestly demonstrates that its primary goal was to provide training for individuals who were involuntarily unemployed, without foregoing welfare assistance,

12. In *New York State Dept. of Soc. Serv.* v. *Dublino*, ... U. S. ...., 93 S. Ct. 2507 (1973), this Court distinguished between cases where states "excluded people from A. F. D. C. benefits whom the Social Security Act expressly provided would be eligible," and situations, as here, where one must measure supplementary state action against the Supremacy Clause. In *Dublino*, the argument that New York's statute conflicted with the federal welfare scheme was rejected because the supplemental programs there involved were found not to conflict with the federal enactment. This finding, however, surely did not constitute an affirmative approval of state supplementary programs sufficient to permit their intrusion upon federal labor policy.

13. See, e.g., remarks of Rep. Machen, 113 Cong. Rec., 90th Cong., 1st Sess. (August 17, 1967), p. 23112. By comparison to this legislative purpose of helping those who, with assistance, will then become able to help themselves, the striking employee is in a markedly different situation. A strike, by its very nature, constitutes concerted economic activity of employees. A striking employee, in contrast to those for whom the A. F. D. C. program was directed, has "control over his family's economic destiny . . . [and] access to collective bargaining [and strikes as a], means of economic persuasion. . . ." *Carleson* v. *Remillard*, 406 U. S. 598, 603 (1972). Should a striker decide to break with the concept of majority rule and defect from a strike, he may, without penalty, frequently resign from the union and return to work. *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213 (1972). A striking employee, in addition, has a federal right to return to a job, retains all of the prestrike rights of that job (see, e.g., *N. L. R. B.* v. *MacKay Radio & Tel. Co.*, 304 U. S. 333 (1938)) and, by virtue of his con-

while they sought to get back into the work force.[14] If, instead, support of the needy was the primary objective, as the State suggests (brief, pp. 5-6), the needy who "have not been in the labor force, or whose attachment to the labor force has been casual," would also have been included. House Report No. 544, 90th Cong., 1st Sess. (1967), p. 108; and see Hearings on H. R. 12080 before the Senate Committee on Finance, 90th Cong., 1st Sess., pp. 264, 269.[15] In accordance with this limited objective, in the 1967 A. F. D. C. amendments, Congress, for the first time, punished individuals who failed to accept work for other than "good cause," a term restricted to physical disabilities or health and safety hazards. 45 C. F. R. 233.100(a)(3)(ii). In sum, as one commentator concludes: "Strikers clearly do not fit within any of the categories of unemployed persons whom Congress attempted to assist through the A. F. D. C.-U. program." Note, 39 U. Chi. L. Rev. at 90.

4. In view of the above-described absence of specific Congressional direction and questionable federal welfare interest in providing assistance to strikers, neither this Court's summary affirmance in *Davidson* v. *Francis*, 409 U. S. 904 (1972), nor

---

tinuing employment relationship, has access to financial assistance not available to the truly needy. He should be deemed "employed", accordingly, within the meaning of the A. F. D. C. program consistent with his status as an employee under Section 2(3) of the National Labor Relations Act, 29 U. S. C. § 152(3).

14. See, e.g., 107 Cong. Rec. 3767-3768 (remarks of Cong, Byrnes); *Report of Senate Committee on Finance of ADC Benefits to Children of Unemployed Parents*, 87th Cong., 1st Sess. (1961), Rept. No. 165, p. 3, and Note, 39 U. Chi. L. Rev. at 88-90.

15. Indeed, the fact that Congress never made the unemployed parent segment of the A. F. D. C. program mandatory on every state (see 42 U. S. C. § 607; *King* v. *Smith*, 392 U. S. 309 at n. 3, 7 (1968)) is further proof that Congress did not intend that this program become a panacea for alleviating the needs of the children of all parents who, for any reason, were not presently working. If this had been the concern of Congress, not only would there have been no need for the qualifications of 42 U. S. C. § 607(b)(2)(C)(i) and (ii) and 45 C. F. R. 233.100(a)(3)(iii), but the unemployed parent program would clearly have been extended, as is true of the basic A. D. C. program, to unemployed parents no matter where they reside.

the H. E. W. regulations emanating therefrom (App., pp. 123-125), should be deemed indicative of a federal policy to grant A. F. D. C. assistance to strikers. The issue before this Court in *Davidson* did not, as the State presumes (brief, p. 17), involve any Supremacy Clause contention; Maryland's appeal (No. 71-1447) raised only the question of the District Court's construction of the then applicable H. E. W. regulations while the Chamber's separate appeal (No. 71-1554), which did present the constitutional question, was dismissed on jurisdictional grounds. See also *Francis* v. *Chamber of Commerce of the United States*, ... F. 2d ..... (4th Cir. June 20, 1973). Moreover, the Solicitor General's *amicus* brief in *Davidson*, although disagreeing with the District Court, itself suggested summary affirmance to restore the pre-*Davidson status quo*, i.e., a situation in which neither Congress nor H. E. W. had taken any position and where the federal labor policy and the Supremacy Clause accordingly, remained applicable. In these circumstances, the new H. E. W. regulation "obviously does not constitute an expression of congressional intent which would clearly preclude application of the preemption doctrine in the welfare area . . ." Carney, *The Forgotten Man on the Welfare Roll: A Study of Public Subsidies to Strikers*, 1973 Wash. U. L. Q. 469. 548 (1973).

CONCLUSION

For all of the foregoing reasons, as well as the reasons set forth in Petitioners' principal brief, it is respectfully requested that this Court (1) reverse the Court of Appeals and (2) reverse the District Court on the merits.

Respectfully submitted,

HERBERT G. KEENE JR.
JAMES A. YOUNG
1300 Two Girard Plaza
Philadelphia, Pa. 19102

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
111 West Washington Street
Chicago, Illinois 60602
Attorneys for Petitioners

Of Counsel:
STRADLEY, RONON, STEVENS & YOUNG
1300 Two Girard Plaza
Philadelphia, Pa. 19102

LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

MAR 2 1 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; AND A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD; JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; INTERVENOR DEFENDANT: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

and

SUPPLEMENTAL BRIEF FOR PETITIONERS

HERBERT G. KEENE, JR.
JAMES A. YOUNG
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102
LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
111 West Washington Street
Chicago, Illinois 60602
Attorneys for Petitioners

Of Counsel:
STRADLEY, RONON, STEVENS & YOUNG
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102
LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 72-1554

SUPER TIRE ENGINEERING COMPANY: SUPERCAP CORPORATION; AND A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD; JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; INTERVENOR DEFENDANT: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF.

The Petitioner, Super Tire Engineering Company, respectfully requests leave to file a supplemental brief and, in support thereof, states:

During oral argument the Court specifically requested Petitioner's Counsel to supply it with authorities on whether this

Court may, should it find the instant case not moot, address the underlying substantive question, i.e., whether the special availability of state welfare benefits to strikers with a federal right to a job, improperly intrudes into the federal scheme of collective bargaining. In addition, several procedural and substantive questions arose during oral argument which neither side had previously addressed in their briefs. For the limited purposes of providing the authorities requested and responding briefly to these new points, Petitioner requests leave to file a supplemental brief.

Respectfully submitted,

HERBERT G. KEENE, JR.
JAMES A. YOUNG
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
111 West Washington Street
Chicago, Illinois 60602

Attorneys for Petitioners

Of Counsel:
STRADLEY, RONON, STEVENS & YOUNG
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102

LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; AND A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD; JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; INTERVENOR DEFENDANT: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

SUPPLEMENTAL BRIEF FOR PETITIONERS

This supplemental brief is submitted to respond more fully to certain matters raised by the Court during oral argument:

1. Various members of the Court inquired of Petitioners' counsel as to the authority for this Court to consider the merits

of the instant case[1] should it decide that the Court of Appeals erred in dismissing the matter as moot.[2] There is ample such authority; where, as here, issues are "fully presented by the petition for certiorari" (*Ecker* v. *Western Pactific R. Corp.*, 318 U. S. 448, 489 (1943) and "fully argued both here and [below]" (*Dandridge* v. *Williams*, 397 U. S. 471, 475-6, n. 6 (1969)), this Court has resolved questions not reached by courts of appeals. Indeed, this Court has even decided issues "not considered by the court below" where there was no argument of such issues. *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 567-8 (1931). A similar determination, in the event the Court decides that the present case is not moot, is particularly apropos here "inasmuch as counsel have united in presenting . . . all questions thought to arise upon the record and the litigation has covered a considerable period."[3] *Cole* v. *Ralph*, 252 U. S. 286, 290 (1920). In addition, the merits of this case raise "only issues of law not calling for examination or appraisal of evidence" (*Kiefer-Stewart Co.* v. *Seagram & Sons*,

1. That issue, which was resolved by the District Court but not reached by the Court of Appeals, is whether the payment of state welfare benefits to strikers constitutes an unconstitutional impediment to the enforcement of federal labor policy.

2. Mr. Justice Rehnquist inquired during argument as to whether *Moore* v. *Ogilvie*, 394 U. S. 814 (1969), can be distinguished from the instant situation since there the case assertedly became moot only after it was before this Court while the alleged mootness in this case occurred at the time of the District Court's decision. This distinction, however, is not determinative. See, *e.g.*, *Dunn* v. *Blumstein*, 405 U. S. 330 (1972), involving a *Moore* issue, and *Roe* v. *Wade*, 410 U. S. 113 (1973), where in each instance the alleged mootness occurred *before* decision by either the District Court or Court of Appeals.

3. The complaint was filed in this matter on June 10, 1971 and, following the District Court's order of dismissal of July 13, 1971, presented to the court below on July 17, 1971. The decision of the Court of Appeals, however, did not issue until November 22, 1972. App., pp. 1-7. Moreover, the New Jersey officials who are the principal respondents have never urged that the case be dismissed as moot but, in conjunction with petitioners, have pressed for a resolution of the significant substantive issue here presented.

340 U. S. 211, 214 (1951)) which are now in a proper posture for consideration. Accordingly, it is again urged that, if the Court determines this case not to be moot, it resolve the merits of this dispute or, at the least, provide necessary guidance for the lower courts for the resolution of such questions.

2. During oral argument, inquiry was also made as to the applicability, although it had not been urged by any party, of the abstention doctrine in the event of reversal. That doctrine—which is a matter of judicial discretion when "special circumstances" are present (*Baggett* v. *Bullit*, 377 U. S. 360, 375 (1964)) and an "extraordinary and narrow exception" to adjudication of proper controversies (*County of Allegheny* v. *Frank Mashuda Corp.*, 360 U. S. 185 (1959)—is inapplicable to this case. The New Jersey statute and regulations at issue here are not ambiguous. Indeed, since at least 1957, Respondents have uniformly interpreted the state law so as to permit the payment of welfare benefits to strikers (App., pp. 129-132)—a policy that, significantly, was not altered when New Jersey enacted a new public assistance program in 1971. See Petitioners' reply brief, pp. 5-6. There is surely little likelihood that the state courts will now arrive at a different construction. Coupled with the irreparable nature of the alleged injury (See Petitioner's principal br., p. 13 and p. 15, n. 14), the long standing course of state conduct falls outside the "special circumstances" prerequisite to the abstention doctrine, particularly in view of the lengthy history of this litigation. (See n. 3, *supra*). Cf. *Griffin* v. *School Board*, 377 U. S. 218 (1964); and *Stephens* v. *Yeomans*, 327 F. Supp. 1182 (D. N. J. 1970).

3. The merits of this case depend on whether, in permitting strikers to receive a substantial state subsidy[4] that is denied to

4. Mr. Justice Brennan inquired during oral argument as to the amount of the benefits here at issue. Although no exact evidence on this issue is present in the record, New Jersey has typically been one of the more generous states in granting welfare assistance (see, *e.g.*, Thieblot and Cowin, *Welfare and Strikes: The Use of*

other persons who refuse to accept available employment, New Jersey has thereby weighed "the same competing interests of employers, employees, laboring unions, and the public among which Congress struck a balance in establishing a national legal framework for the conduct of organizational activity, collective bargaining, and labor disputes." Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1365 (1972). The answer to this question must be in the affirmative.[5] New Jersey has created, based solely on its view of "the right of the individual to participate in a bona fide labor dispute" (App., p. 130), one rule for those engaged in a "lawful strike" and another rule for all other welfare recipients who decline available employment. Clearly, in formulating this distinction, the state has necessarily weighed the same interests as Congress did when it enacted a national labor law.[6] Since the state policy cannot be justified under either federal welfare or labor law,[7] the

Public Funds to Support Strikes, Industrial Research Unit, University of Pennsylvania Press (1972), p. 247, Table A-5, and, generally, strikers have received through public assistance 80-90% or more of their working income with payments in the area of $300-350 per month commonplace. *Id.* at 100-101, 142, 148, 199-200.

5. This Court's summary affirmance in *Francis* v. *Davidson*, 340 F. Supp. 351 (D. Md. 1972), aff'd 409 U. S. 904 (1972), which raised only the question of construction of the then applicable H. E. W. regulations (see Petitioners' reply brief, p. 11), did not answer this issue. In fact, following H. E. W.'s revision of its regulations consistent with *Francis* (App. pp. 123-125), the injunction in that case has, upon petition of Respondent State of Maryland, been dissolved.

6. Mr. Justice White asked during oral argument as to whether this reasoning would also preclude state welfare subsidies to individuals who are locked out by their employer. Again, since such persons continue to be "employees" under federal labor law, the answer must be in the affirmative. The state, as in the case of strikers, would simply be enforcing, by treating in the absence of a specific factual determination, locked-out employees as non-employees, its own conception of the appropriate balance between the competing interests in the area of labor relations. That balance, however, must be struck by Congress, not the states.

7. Respondents during oral argument defended the special treatment afforded strikers by arguing that the denial of benefits to

New Jersey policy of granting public assistance to strikers must be found to be constitutionally impermissible.

Respectfully submitted,

HERBERT G. KEENE, JR.
JAMES A. YOUNG
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
111 West Washington Street
Chicago, Illinois 60602

Attorneys for Petitioners

Of Counsel:
STRADLEY, RONON, STEVENS & YOUNG
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102

LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

---

strikers would improperly discourage activities sanctioned by federal and state law. Such an effect is clearly not improper. See *Butcher* v. *Florida Industrial Comm.*, 231 So. 2d 47 (Fla. 1970); and *Russo* v. *Kirby*, 453 F. 2d 548 (2nd Cir. 1971). The state, to preserve the balance struck by Congress, must maintain the *status quo ante bellum*. Indeed, as Mr. Justice Powell noted during oral argument, insofar as it has arbitrarily selected certain strikers for exemption while disregarding others, its actions raise serious equal protection concerns. Cf., *e.g.*, *Shapiro* v. *Thompson*, 394 U. S. 618, 641 (1969).

Supreme Court, U. S.
FILED
MAR 28 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; and R. ROBERT SCHAEVITZ,
Petitioners,

vs.

LLOYD W. McCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant; TEAMSTERS LOCAL UNION NO. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS, McCORKLE AND ENGELMAN, IN RESPONSE TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR PETITIONERS

WILLIAM F. HYLAND,
Attorney General of New Jersey,
Attorney for Respondents, Lloyd W. McCorkle, Commissioner of Institutions and Agencies, and Irving J. Engelman, Director, Division of Public Welfare,
State House Annex,
Trenton, New Jersey 08625.

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel and on the Brief.

JANE SOMMER,
PAUL N. WATTER,
Deputy Attorneys General,
On the Brief.

TABLE OF CONTENTS

PAGE

Cases Cited

Gibson v. Berryhill, 411 U. S. 564 (1973) 5

J. I. Case Co. v. Borak, 377 U. S. 426 (1964) 3

Mazer v. Stein, 347 U. S. 201 (1954) 3

New York State Department of Social Services v. Dublino, 413 U. S. 405 (1973) 5

Railroad Com'n v. Pullman Co., 312 U. S. 496 (1941) 5

Rosado v. Wyman, 397 U. S. 397 (1970) 6

Southern Pacific Terminal Co. v. I.C.C., 219 U. S. 498 (1911) 4

Statutes Cited

National Labor Relations Act 2-6

Social Security Act 5

42 U.S.C. (Social Security Act):

Sec. 602(a)(19) 5

Rules Cited

45 C.F.R.:

Sec. 220.35 5

Sec. 233.11 5

Supreme Court Rule 40(1)(d)(2) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY, SUPERCAP CORPORATION and A. ROBERT SCHAEVITZ,

Petitioners,

v.

LLOYD W. MCCORKLE, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; IRVING J. ENGELMAN, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; FRED L. STRENG, Director of the Camden County, New Jersey Welfare Board; JUANITA E. DICKS, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey; Intervenor Defendant; TEAMSTERS LOCAL UNION No. 676, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

The third question presented by the Petition for Writ of Certiorari is: "Does the State grant of welfare assistance to strikers contravene federal labor policy by insulating one party—the striking union—from the economic disadvantages of a strike, and thus deviate from the State's required neutral position in collective bargaining?" In urging the Court to answer this question affirmatively, the petitioners argued that any payment of welfare benefits to strikers would be inconsistent with the National Labor Relations Act. This argument was not based on any factual assertion that New Jersey treats strikers differently from other needy persons who apply for welfare assistance. On the contrary, the common assumption in the Court of Appeals (See App. 48-49) and in the original briefs filed with the Court was that welfare benefits are available to strikers on the same terms as to all other needy persons.* In short, it was the petitioners' position in their original brief that the NLRA requires recognition of a special disqualification of strikers from eligibility for welfare benefits to which they would be otherwise entitled.

---

* The regulations of the New Jersey Division of Public Welfare appearing at App. 129-139 clearly evidence an intention to treat the fact that an applicant for assistance is on strike as irrelevant, rather than to confer any special benefits. Furthermore, the record does not indicate how the phrase ". . . refuses, without just and reasonable cause, to seek work, or to make himself available for referral to and consideration by prospective employers. . . ." in these regulations has been construed administratively. Since the petitioners, prior to the filing of the supplemental brief, had relied on the theory that the NLRA prohibits the payment of any welfare benefits to strikers, regardless of the particular circumstances under which a non-striker may be disqualified from receiving benefits, there had been no need previously to explore the exact manner in which these regulations are interpreted and implemented by the State of New Jersey.

However, the supplemental brief now inverts this position and asserts, without any support in the record, that the State confers special benefits upon strikers which are not made available to other needy persons. The attempt at this late date to thus radically reformulate the question presented by this appeal is manifestly improper. Since the petitioners deliberately limited their substantive argument in the petition for writ of certiorari to the contention that *any* payment of welfare benefits to strikers was *per se* inconsistent with the NLRA, they should not now be permitted to urge an entirely different point. Under Supreme Court Rule 40(1)(d)(2), only questions presented in the petition for writ of certiorari will be considered by the Court, not questions subsequently introduced by the petitioner. *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 428-429 (1964). Furthermore, although the State agrees with the observation in petitioners' motion that there were matters raised in oral argument which neither side had previously addressed in their briefs, this does not provide justification for the petitioners to project a question for decision which is substantially different from the questions presented by the petition for writ of certiorari. It is unquestionably appropriate for an appellate court to explore during oral argument issues beyond those directly presented by the case before it, in order to place the case in proper perspective, but "[t]he fact that the issue was mentioned in argument does not bring the question properly before [the Court]". *Mazer* v. *Stein,* 347 U. S. 201, 206, n. 5 (1954).

If the issue on this appeal were the one raised in the petitioners' supplemental brief, rather than the one stated in the petition for writ of certiorari and the earlier briefs, then it would be necessary to fully reconsider the procedural issues of mootness and abstention in that context.

First, the contention that the State of New Jersey is extending preferential treatment to strikers in the administration of welfare programs could present a factual issue requiring an evidentiary hearing. Furthermore, for the resolution of that factual issue to have any relevance to the petitioners and the respondent labor union, such a hearing would have to relate to administrative practices in June 1971 when the strike which led to this litigation occurred. Such a hearing would also have to focus on welfare board practices in Camden County and any other counties in which the petitioners' employees were living in 1971, since the federal categorical assistance programs and supplemental state programs in New Jersey are administered locally by county welfare boards and there are therefore some variations in administration from county to county. It is difficult to resist the conclusion that such a hearing, which could only yield findings concerning the administrative practices of certain county welfare boards in paying welfare benefits to strikers in 1971, would be an academic exercise. Therefore, even if the issue of whether the NLRA prohibits a state from paying strikers welfare benefits is "capable of repetition, yet evading review", *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U. S. 498, 515 (1911), the claim that the State conferred special benefits on the petitioners' striking employees in 1971 is in the realm of "abstraction, ambiguity and conjecture" which led the Third Circuit to conclude that the case was moot (App. 65).

Second, if the issue before the Court were whether the State could confer special benefits on strikers consistent with federal law, a significant abstention question would emerge. If it could be shown that special benefits were being paid to strikers, it is possible that the state courts would hold that the payment of such benefits is inconsist-

ent with state law. Under these circumstances, it would be appropriate for the federal courts to abstain from hearing the matter until after the state courts had had an opportunity to decide whether the state welfare administrators were acting in conformity with state law. *Railroad Com'n* v. *Pullman Co.*, 312 U. S. 496, 501 (1941); *Gibson* v. *Berryhill*, 411 U. S. 564, 574 (1973).

Finally, if it had been appropriately presented, the claim that the State was extending special benefits to strikers might have raised substantial questions concerning the conformity of the State's administration of the federal categorical assistance programs with the Social Security Act and the regulations adopted thereunder by the Department of Health, Education and Welfare. A strikers' entitlement to welfare benefits is a question of basic eligibility under the provisions of the federal categorical assistance program, which is amplified in detailed federal regulations promulgated by HEW setting forth circumstances under which an individual's refusal to accept work or to participate in a work training program may be grounds for refusing to take that applicant's needs into account in calculating the amount of a grant. 45 C.F.R. §220.35, *et seq.*; 45 C.F.R. §233.11. *Cf. New York State Department of Social Services* v. *Dublino*, 413 U. S. 405 (1973). See generally 42 U.S.C. §602(a)(19).* There-

* It also should again be noted that the Social Security Act (42 U.S.C. §602(a)(19)) does not authorize the disqualification of the entire family of an applicant who refuses to accept work or to participate in a work training program. See 45 C.F.R. §233.11. Whereas the original briefs for the petitioners seemed to urge that the NLRA would require a strikers' entire family to be disqualified from receiving assistance, the argument now presented apparently would restrict the disqualification to only the striker personally.

fore, if this case involved a comparison of the administrative screening by the State of New Jersey of applications for AFDC benefits by strikers and non-strikers this could raise questions concerning the State's conformity with the requirements of the Social Security Act and HEW regulations. This court has stated that HEW should be invited to participate as *amicus curiae* in cases involving the administration of the federal categorical assistance programs. *Rosado* v. *Wyman,* 397 U. S. 397 (1970). The fact that HEW's views have not been heard is a further reason for the Court to refuse to entertain the questions now introduced for the first time in the petitioners' supplemental brief.

For these reasons, it is respectfully submitted that the Court should reject the petitioners' belated attempt to have this appeal decided on the premise that New Jersey treats strikers differently from other needy persons who apply for welfare assistance. Rather, the only question properly before the Court is whether the payment of welfare benefits to strikers is *per se* inconsistent with the NLRA. To answer *this* question, the Court should look to the Social Security Act rather than the NLRA for the reasons expressed in detail in the State's original brief. Since the Social Security Act contains no express prohibition against the payment of welfare benefits to strikers and the legislative history of the Act shows that Congress has been aware of the controversy concerning this

issue, the Court should uphold the propriety of the payment of welfare benefits to needy persons on strike.

Respectfully submitted,

WILLIAM F. HYLAND,
Attorney General of New Jersey,
Attorney for Respondents, McCorkle and Engelman.
By: STEPHEN SKILLMAN,
Assistant Attorney General.

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel and on the Brief.

JANE SOMMER,
PAUL N. WATTER,
Deputy Attorneys General,
On the Brief.

Syllabus

SUPER TIRE ENGINEERING CO. ET AL. *v.* McCORKLE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72-1554. Argued January 15, 1974—Decided April 16, 1974

Workers engaged in an economic strike in New Jersey are eligible for public assistance through state welfare programs. Petitioners, employers whose plants were struck, brought this suit for injunctive and declaratory relief against such eligibility, claiming that the regulations according benefits to striking workers were invalid because they interfered with the federal labor policy of free collective bargaining expressed in the Labor Management Relations Act and with other federal policy set forth in the Social Security Act. Before the case was tried, the labor dispute was settled and the strike ended. The District Court, rejecting the respondent union's contention that the case had been mooted, dismissed the complaint on the grounds that Congress was the appropriate forum for the claim and that the challenged laws did not violate the Supremacy Clause. The Court of Appeals remanded the case with instructions to vacate and dismiss for mootness. *Held:* To the extent that *declaratory* relief was sought, the case-or-controversy requirement of Art. III, § 2, and the Declaratory Judgment Act is completely satisfied. Pp. 121–127.

(a) Even though the case for an injunction dissolved with the settlement of the strike and the strikers' return to work, the petitioners and respondent state officials may still retain sufficient interests and injury to justify declaratory relief. Pp. 121–122.

(b) The challenged governmental action is not contingent upon executive discretion and has not ceased, but is a fixed and definite policy which, by its continuing presence, casts what may well be a substantial adverse effect on petitioners' interests. *Oil Workers Unions* v. *Missouri*, 361 U. S. 363; *Harris* v. *Battle*, 348 U. S. 803, distinguished. Pp. 122–125.

(c) If judicial review were conditioned on the existence of an economic strike, this case most certainly would be of the type presenting an issue "capable of repetition, yet evading review," *Southern Pac. Terminal Co.* v. *ICC*, 219 U. S. 498, 515. It suffices that the litigant show an immediate and definite governmental

action or policy that has adversely affected and continues to affect a present interest, since to require the presence of an active labor dispute would unduly tax the litigant by slighting claims of adverse injury from actual or immediately threatened governmental action, and since otherwise a state policy affecting a collective-bargaining arrangement but not involving a fine or other penalty could be only rarely adjudicated, and the purposes of the Declaratory Judgment Act would be frustrated. Pp. 125–127.

469 F. 2d 911, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, and MARSHALL, JJ., joined. STEWART, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 127.

Lawrence M. Cohen argued the cause for petitioners. With him on the briefs were *Herbert G. Keene, Jr.*, and *James A. Young*.

Stephen Skillman, First Assistant Attorney General of New Jersey, argued the cause for respondents McCorkle et al. With him on the briefs were *George F. Kugler, Jr.*, former Attorney General, *William F. Hyland*, Attorney General, and *Jane Sommer* and *Paul N. Watter*, Deputy Attorneys General. *Robert F. O'Brien* argued the cause and filed briefs for respondent Teamsters Local Union No. 676.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In New Jersey, workers engaged in an economic strike are eligible for public assistance through state welfare programs. Employers whose plants were struck insti-

*Briefs of *amici curiae* were filed by *Milton Smith*, *Gerard C. Smetana*, and *Jerry Kronenberg* for the Chamber of Commerce of the United States, and by *J. Albert Woll*, *Laurence Gold*, and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations.

tuted this suit for injunctive and declaratory relief against such eligibility. Before the case was tried, the labor dispute was settled and the strike came to an end. The question presented is whether a "case" or "controversy" still exists, within the meaning of Art. III, § 2, of the Constitution, and of the Declaratory Judgment Act, 28 U. S. C. §§ 2201–2202.

I

A collective-bargaining agreement between petitioners Super Tire Engineering Company and Supercap Corporation, affiliated New Jersey corporations,[1] and Teamsters Local Union No. 676, the certified collective-bargaining representative for the two corporations' production and maintenance employees, expired on May 14, 1971. Because a new agreement had not as yet been reached, the employees promptly went out on strike. Some four weeks later, with the strike continuing, the two corporations, and their president and chief executive officer, filed the present suit in the United States District Court for the District of New Jersey against various New Jersey officials.[2]

The complaint alleged that many of the striking employees had received and would continue to receive pub-

[1] Super Tire Engineering Company is engaged in the business of truck tire sales and service and the manufacture and sale of industrial polyurethane tires and wheels. Supercap Corporation is engaged in the business of truck tire recapping and repairing.

[2] The named defendants were Lloyd W. McCorkle, Commissioner of the Department of Institutions and Agencies of the State of New Jersey; Irving J. Engelman, Director of the Division of Public Welfare of the Department of Institutions and Agencies of the State of New Jersey; Fred L. Streng, Director of the Camden County, New Jersey Welfare Board; and Juanita E. Dicks, Welfare Director of the Municipal Welfare Department of the City of Camden, New Jersey.

lic assistance through two New Jersey public welfare programs,[3] pursuant to regulations issued and administered by the named defendants. The petitioners sought a declaration that these interpretive regulations,[4] accord-

[3] The General Public Assistance Law, N. J. Stat. Ann. § 44:8–107 *et seq.* (Supp. 1973–1974), a state program, and the Assistance for Dependent Children Law (ADC), N. J. Stat. Ann. § 44:10–1 *et seq.* (Supp. 1973–1974), a federal-state program created by § 402 of the Social Security Act, as amended, 42 U. S. C. § 602.

Effective June 30, 1971, New Jersey elected no longer to participate in the unemployed parent segment of the AFDC program, and enacted, in its place, the Assistance to Families of the Working Poor program, N. J. Stat. Ann. § 44:13–1 *et seq.* (Supp. 1973–1974).

[4] The Regulations (M. A. 1.006, revised Mar. 1957), issued by the New Jersey Department of Institutions and Agencies under the General Public Assistance Law, provided in pertinent part:

"A. Citation of Statute and Constitution

"Chapter 156, P. L. 1947 (R. S. 44:8–108) defines reimbursable public assistance as 'assistance rendered to needy persons not otherwise provided for under the laws of this State, *where such persons are willing to work* but are unable to secure employment due either to physical disability or inability to find employment.'

"The Constitution of New Jersey 1947, Article I, paragraph 19, guarantees that 'Persons in private employment shall have the right to organize and bargain collectively.'

"B. Interpretation and Policy

"It may be inferred from the quoted section of the statute that persons unwilling to work are ineligible for public assistance. However, for purposes of public administration, the phrase 'unwilling to work' must be defined as objectively as possible.

. . . . .

". . . The Constitutional guarantee of the 'right to organize and bargain collectively' implies the right of the individual to participate in a bona fide labor dispute as between the employer and the collective bargaining unit by which the individual is represented. Moreover, a 'strike,' when lawfully authorized and conducted, is recognized as an inherent and lawful element of the process of bargaining collectively and of resolving labor disputes. Accordingly, when an individual is participating in a lawful 'strike,' he

ing benefits to striking workers, were null and void because they constituted an interference with the federal labor policy of free collective bargaining expressed in the Labor Management Relations Act, 1947, 29 U. S. C. § 141 *et seq.*, and with other federal policy pronounced in provisions of the Social Security Act of 1935, *viz.*, 42 U. S. C. §§ 602 (a)(8)(C), 606 (e)(1), and 607 (b)(1)(B).[3] The petitioners also sought injunctive relief against the New Jersey welfare administrators' making public funds available to labor union members engaged in the strike.

---

may not be considered merely because of such participation, as refusing to work without just cause.

"C. Regulations

"Based on the foregoing statement of interpretation and policy, the following regulations are established:

. . . . .

"4. No individual shall be presumed to be unwilling to work, or to be wrongfully refusing to accept suitable employment, merely because he is participating in a lawful labor dispute.

"5. An individual who is participating in a lawful labor dispute, and who is needy, has the same right to apply for public assistance, for himself and his dependents, as any other individual who is needy.

"6. In the case of an applicant for public assistance who is participating in a lawful labor dispute, there shall be an investigation of need and other conditions of eligibility, and an evaluation of income and resources, in the same way and to the same extent as in all other cases. In such instances, 'strike benefits' or other payments available to the individual from the labor union or other source, shall be considered a resource and shall be determined and accounted for."

The record is not clear as to the eligibility of strikers under New Jersey's newly enacted program of Assistance to Families of the Working Poor. Petitioners state that striking workers are eligible for benefits under that program. Brief for Petitioners 4 n. 1. The respondents concede this, as "a matter of administrative application." Tr. of Oral Arg. 46.

[3] The complaint also alleged that the inclusion of striking workers in these programs was contrary to New Jersey law.

With their complaint, the petitioners filed a motion for a preliminary injunction. The supporting affidavit by the individual petitioner recited the expiration of the collective-bargaining agreement, the failure of the parties to reach a new agreement, the commencement and continuation of the strike, the application by many of the strikers for state welfare benefits, and their receipt of such benefits from the beginning of the strike to the date of the affidavit. The affiant further stated that the availability of these benefits interfered with and infringed upon free collective bargaining as guaranteed by Congress and "hardened the resolve of the said strikers to remain out of work in support of their bargaining demands," App. 32, and, in addition, that

> "the current strike will undoubtedly be of longer duration than would have otherwise been the case; that the impact of the grant of welfare benefits and public assistance to the strikers involved has resulted in the State of New Jersey subsidizing one party to the current labor dispute; and that such subsidization by the State has resulted in upsetting the economic balance between employer and employees otherwise obtained in such a labor dispute." *Ibid.*

At the hearing held on June 24 on the motion for preliminary injunction, the union, now a respondent here, was permitted to intervene. App. 37. Counsel for the union contended that "this entire matter . . . has been mooted" because "these employees voted to return to work and are scheduled to return to work tomorrow morning."[*] App. 39. The District Court, nonetheless, pro-

[*] All the strikers returned to work by Monday, June 28, 1971, and normal operations at the corporate petitioners' plants were then resumed.

ceeded to the merits of the dispute and, on the basis of the holding in *ITT Lamp Division* v. *Minter*, 435 F. 2d 989 (CA1 1970), cert. denied, 402 U. S. 933 (1971), ruled that the appropriate forum for the petitioners' claim was the Congress, and that the New Jersey practice of according aid to striking workers was not violative of the Supremacy Clause of the Constitution. The court denied the motion for preliminary injunction and dismissed the complaint. App. 45–46. On appeal, the United States Court of Appeals for the Third Circuit, by a divided vote, did not reach the merits but remanded the case with instructions to vacate and dismiss for mootness. 469 F. 2d 911, 922 (1972). We granted certiorari to consider the mootness issue. 414 U. S. 817 (1973).

II

The respondent union invites us to conclude that this controversy between the petitioners and the State became moot when the particular economic strike terminated upon the execution of the new collective-bargaining agreement and the return of the strikers to work in late June. That conclusion, however, is appropriate with respect to only one aspect of the lawsuit, that is, the request for injunctive relief made in the context of official state action during the pendency of the strike.

The petitioners here have sought, from the very beginning, *declaratory* relief as well as an injunction. Clearly, the District Court had "the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." *Zwickler* v. *Koota*, 389 U. S. 241, 254 (1967); *Roe* v. *Wade*, 410 U. S. 113, 166 (1973); *Steffel* v. *Thompson*, 415 U. S. 452, 468–469 (1974). Thus, even though the case for an injunction dissolved with the subsequent settlement of the strike and the strikers'

return to work, the parties to the principal controversy, that is, the corporate petitioners and the New Jersey officials, may still retain sufficient interests and injury as to justify the award of declaratory relief. The question is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941). And since this case involves governmental action, we must ponder the broader consideration whether the short-term nature of that action makes the issues presented here "capable of repetition, yet evading review," so that petitioners are adversely affected by government "without a chance of redress." *Southern Pac. Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911).

A. We hold that the facts here provide full and complete satisfaction of the requirement of the Constitution's Art. III, § 2, and the Declaratory Judgment Act, that a case or controversy exist between the parties. Unlike the situations that prevailed in *Oil Workers Unions* v. *Missouri*, 361 U. S. 363 (1960), on which the Court of Appeals' majority chiefly relied, and in *Harris* v. *Battle*, 348 U. S. 803 (1954), the challenged governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties.

In both *Harris* and *Oil Workers* a state statute authorized the Governor to take immediate possession of a public utility in the event of a strike or work stoppage that interfered with the public interest. The seizure was not automatic for every public utility labor dis-

pute. It took effect only upon the exercise of the Governor's discretion. In each case the Court held the controversy to be moot because both the seizure and the strike had terminated prior to the time the case reached this Court. The governmental action challenged was the authority to seize the public utility, and it was clear that a seizure would not recur except in circumstances where (a) there was another strike or stoppage, and (b) in the judgment of the Governor, the public interest required it. The question was thus posed in a situation where the threat of governmental action was two steps removed from reality. This made the recurrence of a seizure so remote and speculative that there was no tangible prejudice to the existing interests of the parties and, therefore, there was a "want of a subject matter" on which any judgment of this Court could operate. *Oil Workers*, 361 U. S., at 371. This was particularly apparent in *Oil Workers* because, although the union had sought both declaratory and injunctive relief, the decision the Court was asked to review "upheld only the validity of an injunction, an injunction that expired by its own terms more than three years ago." *Ibid.*

The present case has a decidedly different posture. As in *Harris* and *Oil Workers*, the strike here was settled before the litigation reached this Court. But, unlike those cases, the challenged governmental action has not ceased. The New Jersey governmental action does not rest on the distant contingencies of another strike and the discretionary act of an official.[7] Rather, New Jersey has declared positively that able-bodied striking workers who are engaged, individually and collectively, in an

[7] Although the threat of seizure in *Oil Workers* constituted a far more severe form of governmental action, going as it did to cripple any strike, the features of that action were inexorably contingent, serving to make it more remote and speculative.

economic dispute with their employer are eligible for economic benefits. This policy is fixed and definite. It is not contingent upon executive discretion.[8] Employees know that if they go out on strike, public funds are available. The petitioners' claim is that this eligibility affects the collective-bargaining relationship, both in the context of a live labor dispute when a collective-bargaining agreement is in process of formulation, *and* in the ongoing collective relationship, so that the economic balance between labor and management, carefully formulated and preserved by Congress in the federal labor statutes, is altered by the State's beneficent policy toward strikers. It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract. The question, of course, is whether Congress, explicitly or implicitly, has ruled out such assistance in its calculus of laws regulating labor-management disputes. In this sense petitioners allege a colorable claim of injury from an extant and fixed policy directive of the State of New Jersey. That claim deserves a hearing.

The decision in *Bus Employees* v. *Missouri*, 374 U. S. 74 (1963), is not to the contrary. In that case the Court adjudicated the merits of the same statutory scheme that had been challenged earlier in *Oil Workers*. It reached the merits even though the Governor had terminated the seizure of the public utility. His exec-

[8] It may not appropriately be argued that there is an element of discretion present here in the making of the determination of individual "need" for welfare benefits. That determination has no measurable effect on the rights of the corporate petitioners. Instead, it is the basic eligibility for assistance that allegedly prejudices those petitioners' economic position.

utive order, however, recited that the labor dispute "remains unresolved." The Court's rationale was that, since the labor dispute had not ended, "[t]here thus exists in the present case not merely the speculative possibility of invocation of the King-Thompson Act in some future labor dispute, but the presence of an existing unresolved dispute which continues subject to all the provisions of the Act. Cf. *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U. S. 498, 514–516; *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632." 374 U. S., at 78. The existence of the strike was important in that it rendered concrete the likelihood of state action prejudicial to the interests of the union. It was the remoteness of the threat of state action that convinced the Court in *Oil Workers* to hold that case moot. In the case now before us, the state action is not at all contingent. Under the petitioners' view of the case, it is immediately and directly injurious to the corporate petitioners' economic positions. Where such state action or its imminence adversely affects the status of private parties, the courts should be available to render appropriate relief and judgments affecting the parties' rights and interests.

B. If we were to condition our review on the existence of an economic strike, this case most certainly would be of the type presenting an issue "capable of repetition, yet evading review." *Southern Pac. Terminal Co.* v. *ICC*, 219 U. S., at 515; *Grinnell Corp.* v. *Hackett*, 475 F. 2d 449 (CA1), cert. denied, 414 U. S. 858 and 879 (1973); *ITT Lamp Division* v. *Minter*, 435 F. 2d, at 991. To require the presence of an active and live labor dispute would tax the litigant too much by arbitrarily slighting claims of adverse injury from concrete governmental action (or the immediate threat thereof). It is sufficient, therefore, that the litigant show the existence of an immediate and definite gov-

ernmental action or policy that has adversely affected and continues to affect a present interest. Otherwise, a state policy affecting a collective-bargaining arrangement, except one involving a fine or other penalty, could be adjudicated only rarely, and the purposes of the Declaratory Judgment Act would be frustrated.

Certainly, the pregnant appellants in *Roe* v. *Wade*, *supra*, and in *Doe* v. *Bolton*, 410 U. S. 179 (1973), had long since outlasted their pregnancies by the time their cases reached this Court. Yet we had no difficulty in rejecting suggestions of mootness. 410 U. S., at 125 and 187. Similar and consistent results were reached in *Storer* v. *Brown*, 415 U. S. 724, 737 n. 8 (1974); *Rosario* v. *Rockefeller*, 410 U. S. 752, 756 n. 5 (1973); *Dunn* v. *Blumstein*, 405 U. S. 330, 333 n. 2 (1972); and *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969), cases concerning various challenges to state election laws. The important ingredient in these cases was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society.

The issues here are no different. Economic strikes are of comparatively short duration. There are exceptions, of course. See, for example, *Local 833, UAW* v. *NLRB*, 112 U. S. App. D. C. 107, 300 F. 2d 699, cert. denied *sub nom. Kohler Co.* v. *Local 833, UAW*, 370 U. S. 911 (1962). But the great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender. U. S. Dept. of Labor, Bureau of Labor Statistics, Analysis of Work Stoppages 1971, Table A–3, p. 16 (1973). A strike that lasts six weeks, as this one did, may seem long, but its termination, like pregnancy at nine months and elections spaced at year-long or biennial intervals, should not preclude challenge to state policies that have had their impact and that continue in force, unabated and un-

reviewed. The judiciary must not close the door to the resolution of the important questions these concrete disputes present.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings on the merits of the controversy.

It is so ordered.

MR. JUSTICE STEWART, with whom THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join, dissenting.

The Court today reverses the Court of Appeals and holds that this case is not moot, despite the fact that the underlying labor dispute that gave rise to the petitioners' claims ended even before the parties made their initial appearance in the District Court. I think this holding ignores the limitations placed upon the federal judiciary by Art. III of the Constitution and disregards the clear teachings of prior cases. Accordingly, I dissent.

This Court has repeatedly recognized that the inability of the federal judiciary "to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306 n. 3. See also *North Carolina* v. *Rice*, 404 U. S. 244, 246; *Powell* v. *McCormack*, 395 U. S. 486, 496 n. 7; *Sibron* v. *New York*, 392 U. S. 40, 50 n. 8. Since Article III courts are precluded from issuing advisory opinions, *Hayburn's Case*, 2 Dall. 409; *Muskrat* v. *United States*, 219 U. S. 346, it necessarily follows that they are impotent "to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, *supra*, at 246; *St. Pierre* v. *United States*, 319 U. S. 41, 42.[1]

[1] See generally Diamond, Federal Jurisdiction to Decide Moot Cases, 94 U. Pa. L. Rev. 125; Note, Mootness on Appeal in the

These broad constitutional principles, of course, provide no more than the starting point, since the decision as to whether any particular lawsuit is moot can be made only after analysis of the precise factual situation of the parties involved. But in my view our task in the present case is greatly simplified, for this Court has had several occasions within the past 20 years to apply the general principles of mootness to the specific facts of labor disputes closely analogous to the one at hand.

The first of these cases was *Harris* v. *Battle*, 348 U. S. 803, in which the issue was whether a Virginia statute that permitted the state Governor to order that "possession" be taken of a transit company whose employees were on strike was in conflict with the National Labor Relations Act. The underlying labor dispute was settled and the seizure terminated before the case came to trial, but the trial court nevertheless proceeded to decide the merits of the controversy, finding the statute constitutional. After the Virginia Supreme Court refused review, an appeal was taken to this Court. In a brief *per curiam* opinion, this Court held that the case was moot and ordered the appeal dismissed.

In *Oil Workers Unions* v. *Missouri*, 361 U. S. 363, we had occasion to explicate the holding of *Harris* v. *Battle* in the context of a challenge to Missouri's King-Thompson Act, which allowed the Governor on behalf of the State to take possession of and operate a privately owned public utility affected by a work stoppage. In that case, the underlying strike and seizure had terminated while the case was on appeal to the Supreme Court of Missouri. Nonetheless, that court considered the merits of the law-

---

Supreme Court, 83 Harv. L. Rev. 1672; Note, Mootness and Ripeness: The Postman Always Rings Twice, 65 Col. L. Rev. 867; Note, Cases Moot on Appeal: A Limit on the Judicial Power, 103 U. Pa. L. Rev. 772.

suit, holding the King-Thompson Act constitutional. We read *Harris* v. *Battle* as requiring that the case be held moot, since the termination of both the strike and the seizure left "no 'actual matters in controversy essential to the decision of the particular case' " then before us. 361 U. S., at 367, quoting from *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116.

The constitutionality of the King-Thompson Act was again at issue in *Bus Employees* v. *Missouri*, 374 U. S. 74. The strike and seizure in that case were still in effect at the time of the decision of the Supreme Court of Missouri, but, after the appellants' jurisdictional statement was filed in this Court, the Governor of Missouri terminated the outstanding seizure order. Consequently, the appellees argued that the case had become moot, relying on *Harris* and *Oil Workers*. We rejected the contention, noting that in both those cases, the underlying labor dispute had been settled by the time the litigation reached this Court. In *Bus Employees*, by contrast, the strike was still unresolved, and the appellants were thus fully subject to the provisions of the King-Thompson Act. Hence, we concluded that *Harris* and *Oil Workers* did not control, and we proceeded to decide the merits of the case, holding the Missouri law to be in conflict with the National Labor Relations Act, and thus invalid under the Supremacy Clause.

I think it is clear that the facts of the case before us serve to bring it within the teaching of *Harris* and *Oil Workers*, and outside the ambit of *Bus Employees*. Here, as in *Harris* and *Oil Workers*, both the underlying work stoppage and the challenged governmental action—the providing of welfare benefits to the petitioners' employees—had ceased long before review was sought in this Court. Any view that a federal court might express on the merits of the petitioners' Supremacy Clause claims

would, therefore, amount to an advisory opinion, having no effect on any "actual matters in controversy." As we noted in *Oil Workers*, such an undertaking would ignore a "basic limitation upon the duty and function of the Court, and . . . disregard principles of judicial administration long established and repeatedly followed." 361 U. S., at 368.

The Court offers essentially two arguments aimed at distinguishing this case from *Harris* and *Oil Workers*. First, it says that the very existence of the New Jersey welfare programs constitutes a continuing burden on the petitioners' ability to engage in collective bargaining with the respondent union. Secondly, the Court says that the underlying controversy here is "capable of repetition, yet evading review," and thus comes within the rule of *Southern Pac. Terminal Co.* v. *ICC*, 219 U. S. 498, 515.

Similar arguments, however, were considered and rejected in both *Harris* and *Oil Workers*. In each of those cases it was argued that the *Southern Pacific* doctrine prevented a finding of mootness, and it was also argued that the case was not moot because of the continuing threat of state seizure of public utilities in future labor disputes. The Court's summary dismissal of the *Harris* appeal necessarily rejected both of these contentions, and we explicitly adhered to that holding in *Oil Workers*:

> "In [*Harris*] it was urged that the controversy was not moot because of the continuing threat of state seizure in future labor disputes. It was argued that the State's abandonment of alleged unconstitutional activity after its objective had been accomplished should not be permitted to forestall decision as to the validity of the statute under which the State had purported to act. It was contended that the situation was akin to cases like *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n*, 219

U. S. 498, 514–516. In finding that the controversy was moot, the Court necessarily rejected all these contentions. 348 U. S. 803. Upon the authority of that decision the same contentions must be rejected in the present case. See also *Barker Co.* v. *Painters Union*, 281 U. S. 462; *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360." 361 U. S., at 368–369 (footnotes omitted).

I find no reason to depart from this holding in the case before us. While it is not inconceivable that the petitioners' employees will once again strike and perhaps once again become eligible for future New Jersey welfare benefits, I find little to distinguish that hypothetical situation from the "speculative possibility of invocation of the King-Thompson Act in some future labor dispute"[2] that was present in *Oil Workers*. And, even if it could be assumed that the present controversy is "capable of repetition" within the meaning of the *Southern Pacific* test, I am less than confident that the issues presented can truly be characterized as "evading review." If nothing else, the *Bus Employees* case teaches that even the most confident predictions about the future unreviewability of specific legal controversies are often proved inaccurate. Indeed, several courts of appeals have had the opportunity to consider the precise Supremacy Clause issues now raised by the petitioners in the context of ongoing labor disputes.[3] Given that experience, I

[2] *Bus Employees* v. *Missouri*, 374 U. S. 74, 78.

[3] In *ITT Lamp Division* v. *Minter*, 435 F. 2d 989 (CA1), two cases were consolidated on appeal; one of them involved an ongoing strike. Similarly, the underlying labor dispute in *Russo* v. *Kirby*, 453 F. 2d 548 (CA2), was still in effect at the time of the Court of Appeals' decision, although the appellate court did not reach the employers' Supremacy Clause arguments, since it found that the District Court lacked jurisdiction to hear the suit, which

cannot conclude that it is permissible to resolve these important questions in a case where their resolution will have no direct effect on the parties to the litigation.

The argument that eligibility of strikers for future New Jersey welfare benefits might affect the "ongoing" process of collective bargaining fares no better in the light of the *Oil Workers* decision. The continued existence of the King-Thompson Act in *Oil Workers* arguably had a most significant effect on the employees' collective-bargaining ability, since it threatened to deprive them of their principal economic weapon, the capacity to strike. Yet the Court found the continuing threat of seizure in future labor disputes to be insufficient to save the *Oil Workers* case from mootness. No different weight should be accorded to the petitioners' argument that the possibility of strikers receiving welfare benefits will make future work stoppages less onerous for their employees.[4]

---

had been brought by strikers to *compel* the payment of welfare benefits.

[4] The Court characterizes the governmental action challenged in *Oil Workers* and *Harris* as more "remote" and "contingent" than the New Jersey policy at hand. For mootness purposes, I think that this is a distinction without a difference. For one thing, New Jersey does not automatically extend welfare benefits to striking workers; it merely makes them *eligible* to receive such benefits, provided that they meet all other appropriate criteria. Thus, for the challenged governmental action here to recur, at least two things must happen: the respondent union must again call a strike, and the workers must satisfy the standards of need that may then be set forth in the New Jersey welfare statutes. If the threat of seizure in *Oil Workers* was viewed as "contingent" in nature, no different conclusion can be reached here.

Moreover, as the Court concedes, *ante*, at 123 n. 7, the threat of seizure in *Oil Workers* involved "a far more severe form" of governmental interference in the collective-bargaining process than does the New Jersey policy of making strikers eligible for welfare benefits, since invocation of the Missouri statute served to cripple any strike

In short, I think that this case is completely controlled by *Harris* and *Oil Workers*. The doctrine of mootness is already a difficult and complex one, and I think that the Court today muddies the waters further by straining unnecessarily to distinguish and limit some of the few clear precedents available to us.

For these reasons I would affirm the judgment of the Court of Appeals.

completely. Thus, even if the governmental action involved in *Oil Workers* is viewed as more "contingent" than in the present case, I cannot understand how its effect on the collective-bargaining process can be characterized as less serious.